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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 17

HENRY HAWK, PETITIONER,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JANUARY 9, 1945.

CERTIORARI GRANTED APRIL 23, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 5]

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Habeas Corpus. No. —. Civil

HENRY HAWK, Petitioner,

versus

NEIL OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 10, 1944

To the Honorable Fred Shepherd, Judge of the Above Entitled Court:

By reason of prejudice against the other judges, such prejudice being they do not adjudicate contentions raised in petitions for writs of habeas corpus as provided by law as does; Fred Shepherd. By reason thereof petitioner moves for the disqualifications of the other judges of this Court, namely "Wilson, Polk and Broady."

Jurisdiction

Jurisdiction to issue the writ requested is to be found in the due process and equal protection clauses of the law, and the right to habeas corpus on a showing of illegal imprisonment, in the meaning of the Fourteenth Amendment of the Constitution of the United States. As to which see, Smith [fol. 6] v. O'Grady, 312 U. S. 329; Boyd v. O'Grady, 121 Fed. (2d) 146; Ex parte Sharp, 33 Fed. Supp. 464; Hawk v. Olson, 130 Fed. (2d.) 910; Ex parte, Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448.

Writ of Error Coram Nobis

To avoid any speculation on the part of the Court or Respondent's counsel suggesting that in this case Coram Nobis is the proper remedy, it is petitioner hopes only necessary to point out to the Court that the "Writ of Error Coram Nobis" has been abolished in Nebraska, as to wh-ch

see: 19 Nebraska Law Bulletin 150; In Carlson v. State, 129 Neb. 84, 261 N. W. 339, it was held that an application for writ of error Coram Nobis must be brought within two years of the date of judgment and that confinement in the State Penitentiary was not a disability sufficient to extend that period. When a person has been convicted of crime and delivered to warden under mittimus execution of sentence has commenced and the trial court is without jurisdiction over the case. As to which see 24 Corpus Juris Secundum, page 120.

The petition of Henry Hawk, respectfully shows to this Court as follows:

That his Commitment, Trial and Conviction, deprived him of his liberty without due process of law, in that said Commitment, Trial and Conviction are unconstitutional and void, in that said Commitment, Trial and Conviction were obtained by ordeal and mobocracy, in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States. And petitioner is detained in the Nebraska State Penitentiary, under color of authority of the State of Nebraska, and is in the custody of Neil Olson, Warden of said penitentiary at Lancaster, Lancaster county, Nebraska, which is located within the jurisdiction of this Court. The sole claim and authority by virtue of which Neil Olson, Warden, so restrains and detains your Petitioner is a "Void [fol. 7] Commitment" in that your Petitioner was placed in his custody by a person that kidnap-ed your Petitioner out of the State of California, and the fact that said commitment is based on an illegal trial and conviction entered by the District Court of Douglas County, Nebraska (hereinafter referred to as the Trial Court) all of the aforesaid having been obtained under the following circumstances:

1. On February 11, 1936, your petitioner was arraigned in the Municipal Court Central Police Station Omaha, Nebraska, for the offense of murder in the first degree and bound over to the District Court of Douglas County, Nebraska, without due process of law, in that said Municipal Court Judge deprived your Petitioner of his fundamental right of a continuance within which to consult with counsel and prepare a defense, and forced your Petitioner to proceed without the assistance of counsel or other defense, and that your Petitioner was a federal prisoner in custody of

and under the exclusive jurisdiction of the Federal Government, without and beyond the jurisdiction of said Municipal Court and presiding Judge, at every state of the proceedings in said court.

2. On the same day namely February 11, 1936, and after said order of bind over by the Municipal Court (time about 3:30 P. M., o'clock) your Petitioner was arraigned in the Trial Court (time about 4:00 P. M., o'clock) in custody of and under the exclusive jurisdiction of Federal Government Officials as aforesaid, and was asked to enter a plea to an information of an unscrupulous County Attorney charging him with "Murder in the first degree while attempting to rob Isadore Perelman, on the evening of February 28, 1934," and your Petitioner pleads "Not Guilty" walked out of the Trial Court room in custody of the aforesaid Federal Officers who by train returned your Petitioner to Leavenworth, Kansas, and on the same day namely February 11th, 1936, said Federal Officers committed your Petitioner to said Federal Penitentiary.

3. Thereafter on March 16, 1936, the Federal Officers [fol. 8] referred to in the foregoing paragraphs (Namely Frank G. Mangnum, and R. C. Stephens) by Bus returned your Petitioner to Omaha, Nebraska, and at about 4:15 P. M., o'clock of the same day committed your Petitioner to the County Jail Omaha, Nebraska, and ordered the jailer to place your Petitioner in solitary confinement and your Petitioner was placed in an isolated cell of said jail and held incommunicado only that two Public Officials, Namely Joseph M. Lovely, Public Defender and J. C. O'Brien, assistant Public Defender, for about fifteen minutes interviewed your Petitioner, (time about 11:15 P. M. o'clock) during which time they tried to intimidate your Petitioner to enter a plea of guilty to having murdered Isadore Perelman during an attempted robbery on the evening of February 28, 1934, in that on conviction by a jury petitioner would no doubt but receive a death sentence, and that the County Attorney and Fritz Franks Capitan of Deceit-ives had framed your Petitioner to conviction by the use of two convicts that were going to testify against your Petitioner, at which time your Petitioner informed these Public Officials that he would never plead guilty to such a charge, and further petitioner had exhonorated himself at the Preliminary hearing referred to in paragraph 2; at which time the

two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning.

4. Thereafter on the Following morning March 17, 1936, at about 9:00 A. M. o'clock your Petitioner while in the exclusive jurisdiction custody and control of two Federal Officers your Petitioner was arraigned in the Trial Court, and the Clerk of the Court read an information charging in two counts that your Petitioner "during an attempted robbery on the night of February 28, 1934, shot Isadore Perelman with a revolver and as a result thereof, Isadore Perelman died the defendant thus committed murder in the first degree" whereupon, the Trial Court asked your Petitioner how he pleaded to said counts 1, 2 and your Petitioner pleaded "Not Guilty" and forthwith moved the Trial Court orally for a continuance of twenty-four (24) hours [fol. 9] for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (*w*ednesday), 1936. The allegations that your Petitioner was deprived of his fundamental right of a continuance of twenty-four (24) hours continuance to consult with counsel, examine the charge and prepare a defense and was not represented by counsel leading up to this stage of the proceedings is supported by the undisputable evidence of fact as they more fully appear upon the face of the record a copy of a certified copy of the Clerk-s Transcript which is hereto attached, made a part and parcel of this petition, marked Exhibit "A" and to be considered as though set out in full here. * * *

And to which referrence is prayed as often as may be necessary.

The original certified copy of the trial courts Clerks transcript is in the possession of Petitioner and will be presented on day of hearing of this case, along with a copy of the purported preliminary hearing and testimony of said hearing.

9. On the following morning at about 9:00 A. M., o'clock March 18, 1936, the trial was resumed and further testimony was adduced.

NOTE: From an examination of the Bill of Exceptions duly certified and signed by the Trial Court and Official Court [fol. 10] Reporter that the State called 13 witnesses who testified under oath on Direct Examination and 10 of these witnesses were Cross Examined by defense, and 2 were Re-direct Examined by the State, and that not one of these witnesses in any manner during their testimony connected your Petitioner with the charge laid in the Information Exhibit "A". And that said witnesses' testimony consist of 74 pages (6, 81).

But will say that the Prosecution Officials deliberately interduced perjured testimony in order to be able to make a showing that Isadore Perelman had been shot and had died.

The source of your Petitioner-s knowledge and ground of belief for this allegation is that during the preliminary hearing referred to in paragraph 2, the State called as their witness Dr. C. J. Toohey, and he testified in substance:

> "That at about 8:00 P. M. o'clock February 28, 1934, that Isadore Perelman was admitted to the Lord-Lister Hospital, Omaha, Nebraska, complaining that he had been shot a few minutes earlier during an attempted robbery, and that he performed an emergency operation on Mr. Perelman and removed a leaden bullet from his grion and that at about 1.30 March 1st, 1934, in the morning Isadore Perelman died, and that he had marked the powder cup of said bullet with the letter "S" and gave said bullet to a Police Officer as evidence."

But from an examination of the Bill of Exceptions pp. 21, 22, we find that Dr. S. McCleneghan, testified that he performed the same if not identical operation on Mr. Perelman at the Leslie O'Moore morgue and removed said bullet

on March 1st, 1934. The Bill of Exceptions referred to here will be produced at the hearing of this case and is now in the possession of Petitioner.

We further find from an Examination of the Bill of Exceptions pp. 72, 99, that the State called as their witness Paul DeSanti, and threatened to prosecute him on charges pending against him in the Court if he didn't change his [fol. 11] testimony and give testimony favorable to the State as he did at the preliminary hearing which testimony was untrue and prejudice to your Petitioner's defense, and further the State in the presence of the Trial Court impeached this witness thereby declared him a perjurer and on this amoung other perjured testimony the Trial Court knowingly proceeded to conviction of your Petitioner for a capital offense.

And from an examination without and beyond the record but not inconsistent therewith we will find that no extra newspaper was published the evening of February 28, 1934, giving the account of Isadore Perelman having been killed durring an attempted robbery on that day, as was testified to by Paul DeSanti while under direct examination by the State and of whose witness he was.

We will further find that it would have been an impossibility for your Petitioner to *of* been a frequenter for every day at Paul DeSanti's bootleg joint for eight months previous to February 28, 1934, in that your Petitioner for three years previous to February 1st, 1934, was an inmate of the Iowa State Penitentiary, Fort Madison, Iowa, and had only been in Omaha, Nebraska, previous to February 28, 1934, for three weeks.

This being true it logically follows that Paul DeSanti did give perjured testimony and that said perjured testimony caused your Petitioner's conviction, in violation of the procedural guarantiés protected against state invasion through the Fourteenth Amendment of the Constitution of the United States.

From an examination of the Bill of Exceptions pp. 102, 106, we find that the State called as their next witness Ronald McDonald and in no way did this witness in his testimony connect your Petitioner with the death of Isadore Perelman, he merely in his opinion identified the bullet having been fired from the gun that was an exhibit.

From an examination of the Bill of Exceptions pp. 107, 133, we find that the State called as their witness (time two

o'clock P. M. March 17) Edward Nowicki, and through his rambling testimony he accused your Petitioner as being an [fol. 12] accomplice of his and Paul Taylor during their attempt to rob Isadore Perelman on the evening of February 28, 1934, and he testified in substance:

> "That your Petitioner at all times was with he and Paul Taylor, during the attempted robbery and shooting of Isadore Perelman, the evening of February 28, 1934, and that the robbery was attempted at about 8 P. M. o'clock, and after the robbery and shooting of Isadore Perelman the three of us got in the car and driven away, and latter on at about nine o'clock the same evening the three of us returned to Paul DeSanti's bootleg joint and that while there an extra newspaper came out giving the account of the attempted robbery and shooting of Isadore Perelman, and that previous to February 28, 1934, he had known your petitioner probably two or three months. He further testified that he was an inmate of the Nebraska State Penitentiary held in the County jail at the time of giving his testimony."

From an examination outside of but not inconsistent with the record we will find that this witness referred to above was a felon with a prison record dating back 12 years that he had served time in every penal institution in the State of Nebraska and that his testimony was incompetent, in that it was bribed and perjured, and contradicted, and uncorroborated.

The source of your Petitioner's knowledge and ground of belief for this allegation is the evidence of fact as more fully appears on the face of the record as to the contradiction and uncorroboration compare with Paul Taylor's testimony as more fully appears in Bill of Exceptions pp. 133, 171, and as to bribery it will be proven as perjury by the subpoenaing of witnesses and evidence in the care and custody of Frank Marsh, Secretary of State of Nebraska.

From an examination of the Bill of Exceptions pp. 133, [fol. 13] 171, we will find that the State called as their next witness Paul Taylor and he testified in substance:

> "That he and Eddie Nowicki on the night of February 28, 1934, plan-ed the robbery of Isadore Perelman and that Nowicki, drive the car, and that he shot Isadore Perelman during an attempted robbery of Isadore Perel-

man, and that Henry Hawk was not implicated in said attempted robbery."

It is to be noted that the state impeached this witnesses testimony and thereby declared him a perjurer and before trial of the case this witness was threatened and told by the prosecuting officials he would never live to get out of the penitentiary if he didn't take the stand and swear that Henry Hawk shot Isadore Perelman during the attempted robbery, and he was intimidated while on the stand and this intimidation was sanctioned by the Trial Court, even after it had been brought to his attention, for he said they have a right to do that don't they.

From an examination of the Bill of Exceptions, pp. 172, 175, we find that the State called as their next witness Fred Franks and he testified in substance:

"That the testimony just given by Paul Taylor was perjured testimony and was a different story then he told on May 1st, 1935, during his hearing in Franks Star chambers at Central Police Station during an inquisition at that time by James T. English and James J. Fitzgerald the prosicuting attorney and his assistant."

From an examination of the Bill of Exceptions pp. 176, 179, we find that the state called as their next witness Charles Gieselman, a Police Officer and he testified that Paul Taylor was a perjurer and prosecuting officials knew it when they asked him to take the stand in the case.

[fol. 14] And in spite of the recognition of this fact the Trial Court proceeded to judgment of conviction against your Petitioner, as to which see the record.

From an examination of the Bill of Exceptions pp. 180, 182, we find that your Petitioner called as his witness Henry F. Meyers and he testified as far as material here that:

"He knew the defendant since June 7, 1934, and he wasn't using any alias, that he knew of."

This witness proved that when James T. English knowingly charged your petitioner the defendant with using alias to hide his iden-ty, he English falsely made that charge.

We further find from an examination of the Bill of Exceptions p. 182, that the Public Defender a public official

rested your petitioner's case to prevent him from having the benefit of other witnesses and especially Mary A. Mullen, now Clerk of the United States District Court for Nebraska, and by this witness your petitioner would of proven if given a chance that Eddie Nowicki, aforesaid was a perjurer when he testified he knew petitioner two months previous to February 28, 1934.

Your Petitioner will if necessary produce the Bill of Exceptions at the time of hearing of this case and he now has said Bill of Exceptions in his possession.

5. On the same day namely March 18, 1936, at the conclusions of witnesses' testimony and both sides rested, the Trial Court deprived your Petitioner of due process of law, by instructing said trial jury that they could find the defendant (Petitioner) guilty of the offense of murder in the first degree as charged in the information even though it had been proven in theirs and the Trial Courts presence that someone else (Paul Taylor and Eddie Nowicki), two State witnesses had done the act charged to-wit:

> "Murder in the first degree while attempting to rob Isadore Perelman."

There were as we find 10 instructions, and from an exami- [fol. 15] nation of the 10th instruction we find that the Trial Court invaded the providence of the trial jury by presenting prepared verdicts leaving no alternate but a verdict of guilty when signed by the for-man of the jury. Thereby depriving your Petitioner of a fair and impartial trial by jury in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States.

6. On the same day namely March 18, 1936, the trial jury returned its verdict into Trial Court finding your Petitioner guilty of murder in the first degree "in manner and form as charged in the information, and do fix the Penalty at imprisonment in the penitentiary during life." See p. 13 Exhibit "A".

7. On the same day namely March 18, 1936, the two Public Officials (Joseph M. Lovely and John N. Baldwin) filed a skeleton of a motion for a new trial which should of been granted and would of been granted if the Trial Court was fair and unbiased, but being prejudiced said Trial Court

overruled the motion for a new trial on the following day, and proceeded to judgment of conviction in violation of the procedural guaranties protected against State invasion through the Fourteenth Amendment of the Constitution of the United States by ordering your petitioner (defendant) returned to and committed to the Federal Penitentiary, Leavenworth, Kansas. Compare, Chapter 29-2812 C. S. Neb. 1929; see also, Johnson v. Zerbst, 304 U. S. 458, In re Resler, 115 Neb. 835, 212 N. W. 765; Ex parte Henry Hawk, — U. S. —, 64 Sup. St. Rep. 448, 451.

The motion for a new trial and order overruling same and judgment of conviction refer-ed to above are to be found on pp. 14, 16, of Exhibit "A".

8. Thereafter on the 10th day of April, 1936, and having been deserted by counsel and no one to champion the cause of an appeal Petitioner while confined in the Federal Penitentiary, Leavenworth, Kansas, from his prison cell, with the assistance of — fellow inmate filed in the Trial Court a petition for appeal, affidavit of poverty to cover cost of [fol. 16] appeal, and Notice of appeal. And on the same day namely April 10, 1936, the Trial Court allowed the appeal and ordered the Clerk of the Court and Court Reporter to prepare a transcript and bill of exceptions, respectively and deliver same to (defendant) your Petitioner. But for some reason best known to the Trial Court and Prosecuting Officials the appeal documents were impounded and consealed and never delivered to your Petitioner, and in the mean time your petitioner had petitioned the Supreme Court of Nebraska for an extension of time to lodge the appeal, which petition was denied, and thereupon petitioned the Supreme Court of Nebraska for a writ of mandamus praying an order to have the Trial Court show cause why the appeal documents had not been furnished as ordered, the petition for writ of mandamus was denied. This allegation will be supported by evidence of facts presented at the hearing of said cause.

9. On or about August 6th, 1936, for some reason best known to the United States Attorney Homer S. Cummings and the prison officials Leavenworth, Kansas, your Petitioner was by train transported to Federal Penitentiary, Alcatraz Island, California, and while there filed a writ of Mandamus in the District Court of the United States for the District of Nebraska, Lincoln Division, "Title

Henry Hawk v. Charles A. Goss, et al., case No. 1038 Law," for the purpose of compelling the Supreme Court of Nebraska and Trial Court to show why Petitioner should not be furnished with his appeal documents, the court appointed Robert A. Nelson, now assistant Attorney General of Nebraska to assist your petitioner in prosecuting the petition for writ of mandamus referred to above.

Thereafter on January 20, 1937, Mr. Nelson advised your Petitioner that the Honorable Thomas C. Munger had appointed him to represent your Petitioner in his mandamus action, referred to above. Thereafter on January 24, 1937, Mr. Nelson wrote your Petitioner;

> "I was in Omaha last week, and attempted to locate the Bill of Exceptions but was unable to do so at that time. I have a letter this morning from the court reporter stating that the County Attorney has this in his file."

[fol. 17] Thereafter on September 4, 1937, Mr. Nelson, wrote your Petitioner that:

> "I have finally secured all of the papers and instruments relative to your conviction at Omaha including the Bill of Exceptions which was prepared by the court reporter."

And:

> "In my opinion your remedy is an application for writ of habeas corpus based upon the fact that you were denied your constitutional right to an appeal. This action, however, cannot be maintained until you have completed your present term at Alcatraz and are being held under your conviction in this state."

And:

> "At the present time, I can see nothing to do except wait until your present term is expired and then file the application for writ of habeas corpus."

Mr. Nelson, aforesaid, did file an application purportedly being an application for writ of habeas corpus in the District Court of the United States Lincoln, Nebraska, in behalf of your Petitioner which was denied as more fully appears upon the files of that court. This allegation will be supported by evidence of fact which are in part in the possession

of your Petitioner and by subpoe*an*ing the court records, when on day of hearing.

10. Thereafter, on November 27, 1937, while in the act of leaving the Federal Penitentiary, Alcatraz Island, California, on Parole to officials of Nebraska, namely John Hopkins, then Sheriff and James T. English, then County Attorney of Douglas county, Nebraska, respectively, without jurisdiction or authority of law, seized your Petitioner and placed him in irons in the discharge room of Federal Prison, Alcatraz Island, California, and with the assistance of said prison officials by boat transported your Petitioner over the San Francisco Bay, to Oakland, California, where John Hopkins and James T. English, aforesaid, by force and against the will of Petitioner, placed Petitioner on a train and transported him through several States of the Union to Omaha, Nebraska, placed him in jail on or about Novem-[fol. 18] ber 30, 1937, and thereafter on December 2nd, 1937, John Hopkins, then sheriff by Automobile transported your Petitioner to Lancaster, Lancaster county, Nebraska, and committed him to the Nebraska State Penitentiary where he is confined and has been ever since.

And thereafter your Petitioner has by petition continually complained to this Court and every court in the land as to the illegal manner in which he has been convicted, kidnap-ed and committed to the Nebraska State Penitentiary.

11. Your Petitioner is innocent of the offense of which he has been convicted and could of proven his innocence and did by a prepond--ance of the evidence proved that some one else committed the offense and would have been exhonorated if the Trial Court would on his request granted him his fundamental right of a continuance of twenty-four hours to arra*ign* to employ competent and legal counsel, examine the charge and prepare a defense.

The record bespeaks the truth that the Trial Court had no jurisdiction of your Petitioner, nor accept a plea, proceed to trial, accept a verdict of the jury or pronounce judgment of conviction, and that said Trial Court deprived your Petitioner of a fair trial. Your Petitioner was convicted on perjured testimony knowingly used by the prosecuting officials to obtain his conviction.

And further the record bespeaks the truth that at every state of the proceedings in the Courts of Nebraska during arraignment in the Municipal and Trial Court your Peti-

tioner was in the exclusive jurisdiction and control of Federal Officers without and beyond the jurisdiction of the courts of Nebraska. And that the State of Nebraska on day of judgment of conviction March 19, 1936, relinquished whatever jurisdiction it might have thought it had by withholding the commitment and suspending the sentence and ordering Petitioner to the custody of the Federal Government to be confined in the Federal Penitentiary that was the right of Nebraska. Compare, United States ex rel. Moore v. Traeger, 44 Fed. (2d) at p. 313.

[fol. 19] It logically follows that no jurisdiction or authority of law rested in the State of Nebraska through its officials John Hopkins and James T. English, aforesaid, to seize your Petitioner in the State of California on the 27 day of November, 1937 and by train transport him through several states of the Union as your Petitioner was not a fugitive from justice in the meaning of Article IV, Sec. 2, Cl. 2; of the Constitution of the United States, from the State of Nebraska, nor was any requisition ever made out and signed by Governor Roy H. Cochran, then Governor of Nebraska, requesting from the Governor of California the extradition of your Petitioner out of the State of California, nor was any authority given by the Governor of California to John Hopkins and James T. English aforesaid, to remove your Petitioner out of California as they did do on the 27 day of November, 1937. Nor was any jurisdiction vested in the Governor of the State of California to sign extradition papers at that time for the removal of your Petitioner in that your Petitioner at that time November 27, 1937, was without and beyond the Jurisdiction of the Governors of California and Nebraska, in that he was on an Island (Alcatraz Island) Government property without and beyond the jurisdiction of the Governor of California (as to which see Jerome v. United States, 318 U. S. 101; Miller v. McLaughlin, 118 Neb. 174, 224 N. W. 18; Miller v. McLaughlin, 281 U. S. 261.)

Your Petitioner alleges and contends and shows the Court that by reason of the foregoing, his unlawful seizure in the State of California, Trial, Conviction and Commitment entered by the District Court of Douglas County, Nebraska, deprived him of his liberty without due process of law, in that his seizure as aforesaid, Trial, Conviction and Commitment are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation

of procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, in this, to-wit:

(a) In that he was illegally, unlawfully without jurisdiction or authority of law by the officials of Nebraska seized [fol. 20] and forcibly transported out of the State of California on the 27 day of November, 1937 in interstate commerce and brought into the State of Nebraska and committed to the Nebraska State Penitentiary where he is now confined and has been ever since the 2nd day of December, 1937. This allegation is supported by the undisputed evidence of fact that your Petitioner was deprived of due process of law and the right to contest his illegal seizure and removal out of California in the Courts of California on extradition proceedings as provided by Article 4, Sec. 2, Cl. 2; Const. United States. Does he then show himself entitled to the relief he seeks and prays for herein? It is respectfully submitted that the Supreme Court of Nebraska answered that question in the affirmative. Compare, In re. Robinson, 29 Neb. 135, 45 N. W. 267; Ex parte Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448, 451.

(b) To avoid any speculation of the part of the Respondents putting up the claim that their action in seizing your Petitioner in the State of California was justified even though illegal in that Petitioner was seized by Nebraska Officials as alleged in that he was wanted to suffer penalty in the Nebraska State Penitentiary for murder that contention would fall with the premises in that the trial and conviction of your Petitioner Entered by the District Court of Douglas County, Nebraska, by virtue of which authority the Respondents detain your Petitioner was entered in express violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States in that the Trial Court deprived your Petitioner of his fundamental right of twenty-four hours to consult with counsel, examine the charge by a service of same, and prepare a defense. This allegation is supported by the evidence of fact as more fully appears on the face of the record (Exhibit "A", pp. 4, 6). Does he then show himself entitled to the relief he seeks and prays for herein?

It is respectfully submitted that the Supreme Court of Nebraska and the United States Sup. Ct. answered this question in the affirmative. Compare, Zink v. State, 34

[fol. 21] Neb. 37, 51 N. W. 294; Ex parte Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448, 451, and the authorities there cited.

(c) In that your Petitioner's Trial and Conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and Trial Court. This allegation is supported by the evidence of fact as more fully appears upon the record to be presented on day of hearing and by testimony of witnesses to be given at the hearing. Does he then show himself entitled to the relief he seeks and prays for herein? It is respectfully submitted that this question has been answered in the affirmative by the United States Supreme Court as to which see, Ex parte Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448, 451, and the authorities there cited.

Wherefore, your petitioner having alleged and shown that his Commitment, Trial and Conviction entered by the District Court of Douglas County, Nebraska, deprived him of his liberty without due process of law, in that said Commitment, Trial and Conviction were obtained by ordeal and mobocracy; in violation of procedural guaranties protected against State invasion through the Fourteenth Amendment of the Constitution of the United States, prays that a Writ of Habeas Corpus may issue, directed to Neil Olson, Warden of the Nebraska State Penitentiary, at Lancaster, Lancaster County, Nebraska, to bring and have your Petitioner before this Court, forthwith, together with the true cause of your Petitioner's detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts and the legality of your Petitioner's imprisonment, restraint and detention, and thereupon to dispose of your Petitioner as law and justice may require.

Henry Hawk, Petitioner.

Duly sworn to by Henry Hawk. Jurat omitted in printing.

[fol. 22] EXHIBIT "A" TO PETITION

Pleas before the Honorable John W. Yeager one of the Judges and the Presiding Judge of the District Court of the Fourth Judicial District of the State of Nebraska, at a Term thereof within and for the County of Douglas, begun

and held in the City of Omaha, on the 3rd day of February, A. D. 1936.

[fol. 23] Be it remembered, That in a certain cause lately pending in the District Court of Douglas County State of Nebraska entitled The State of Nebraska vs. Henry Hawk, alias Henry Hawks; etc., appearing on CR Docket 39 Number 464 there was filed and entered in the office of the Clerk of said Court on the 17th day of February, 1936, a certain Information, which said Information is in the words and figures following, to wit:

INFORMATION

THE STATE OF NEBRASKA,
County of Douglas, ss:

Of the February Term of the District Court of the Fourth Judicial District of the State of Nebraska, within and for the County of Douglas and state of Nebraska, in the year of our Lord nineteen hundred Thirty-six I, James T. English, County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and on behalf of said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed, that on or about the 28th day of February in the year of our Lord nineteen hundred thirty-four Henry Hawk, alias Henry Hawks, alias Charles Henry late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, then and there in and upon one Isadore Perelman, then and there being, unlawfully, feloniously, maliciously and forcibly did make an assault with the intent then and there forcibly and by violence and by putting him the said Isadore Perelman, in fear, to take from the person and against the will of him, the said Isadore Perelman, the money and personal property of value to him, the said Isadore Perelman, and thereby then and there the said Isadore Perelman to rob, and the money and personal property aforesaid, to [fol. 24] steal, take and carry away; and the said Henry Hawk, alias Henry Hawks, alias Charles Henry then and there did attempt unlawfully, feloniously, forcibly and by putting him, the said Isadore Perelman, in fear to take from

the person and against the will of the said Isadore Perelman, the money and personal property of value of him, the said Isadore Perelman, with the intent thereby then *then* and there the said Isadore Perelman to rob and the money and personal property aforesaid, to steal, take and carry away, and the said Henry Hawk, alias Henry Hawks, alias Charles Henry, whilst engaged in said attempt to perpetrate a robbery in and upon the said Isadore Perelman, feloniously, purposely and of his deliberate and premeditated malice, shot said Isadore Perelman with a revolver and as a result thereof he died on the 1st day of March, 1934; defendant thus committed murder in the first degree while attempting to rob.

Count II

And the said Henry Hawk, alias Henry Hawks, alias Charles Henry, then and there being in the City of Omaha, County of Douglas and State of Nebraska, then and there feloniously, maliciously, purposely and of his deliberate and premeditated malice, shot Isadore Perelman with a revolver and as a result thereof he died on the 1st day of March, 1934, defendant thus committed murder in the first degree; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska.

James T. English, County Attorney.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, James T. English, being first duly sworn, on oath depose and say that I know the contents of the foregoing information, that I have read the same, and the facts set forth in said information are true, to the best of my knowledge and belief.

James T. English.

[fol. 25] Subscribed in my presence and sworn to before me, this 17th day of February, A. D. 1936.
Frank McGrath, Clerk of the District Court. (Seal.)

Endorsed: Ap. Doc. 39, No. 464. District Court, Douglas County. The State of Nebraska vs. Henry Hawk, alias Henry Hawks, alias Charles Henry. Information Charge First Degree Murder While Attempting to Rob. Filed Feb. 17, 1936. Frank McGrath, Clerk, by Leonie Groves, Deputy.

Recorded, Journal 351, Page 49. James T. English, County Attorney.

Witnesses: Paul De Santi, 2029½ Pierce St.; Ben Barone, 2450 So. 20th St.; James Farascio, 2204 So. 19th; Edward Nowicki, Douglas Co. Jail; James Reddon, 3009 Valley; John Wieczorek, 3009 Valley; Edward B. Nelson, 3023 Haskel; John Urzendowski, 2908 Deer Park; John W. Thorp, 3023 Haskel; Mrs. John W. Thorpe, 3023 Haskel; James John, 3024 Grover; Edward Sobczyk, 3002 Vinton St.; Joseph Dargaczewski, 3018 Spring; Byron Thorp, 3023 Haskel; Sam DiBaise, 2919 Valley; Donald Moran, 2930 Deer Park; Paul Taylor; Dr. C. J. Toohey, Lord Lister Hospital; Frank Freeman, Police Officer; Fred Franks, Police Officer.

Afterward, at the February 1936 Term of said Court, and on the 16th day of March, 1936, an Order was entered herein, as appears on Journal 351 Page 177, which said Order is in the words and figures following, to wit:

Information: 39-464. First Degree Murder While Attempting to Rob

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant

ARRAIGNMENT AND PLEA

Now, on this day, comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry is brought into Court in custody of Guards of Federal Penitentiary, Leavenworth, Kansas.

[fol. 26] Thereupon said defendant is arraigned and the information heretofore filed herein being read to him for plea thereto says he is not guilty as charged in Count 1. and not guilty as charged in Count II thereof.

Defendant thereupon moves for continuance for at least twenty-four hours, upon full consideration whereof it is ordered by the Court that said motion be and hereby is overruled.

Afterward, at the February 1936 Term of said Court, and on the 16th day of March, 1936, an Order was entered herein, as appears on Journal 351 Page 178, which said Order is in the words and figures following, to-wit:

Information: 39-464 First Degree Murder While Attempting to Rob

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant

TRIAL ORDER

Now, on this day, this cause came on for trial, the County Attorney appearing on behalf of the State of Nebraska, the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, having been brought into court in custody of the Sheriff.

Thereupon came the following named persons as jurors, to wit: Thos. P. Connor, John F. Furay, Clement M. Robb, Wm. M. Haggen, Lem A. Longfellow, Otto Heitman, Wilbur F. Spencer, Albert H. Koch, Anton Radanovich, Vivian C. Frazell, Kenneth G. Sciple, Louis B. Houser, who were duly impaneled and sworn according to law, and the trial proceeds.

The said jury having heard the opening statements and the evidence adduced in part, further hearing of this cause is continued to Thursday morning, March 17, 1936, at nine o'clock.

[fol. 27] Afterward, on the 18th day of March, 1936, Instructions by the Court were filed herein, which said Instructions are in the words and figures following, to wit:

IN DISTRICT COURT, DOUGLAS COUNTY, NEBRASKA

Cr. Dkt. 39 No. 464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant.

INSTRUCTIONS BY THE COURT

GENTLEMEN OF THE JURY:

You are Instructed as follows:

Instruction No. 1

This is a criminal action, prosecuted by the County Attorney of Douglas County, pursuant to law, in the name of and for the State of Nebraska, plaintiff. The information on which the prosecution is based, charges in substance as follows:

That on or about the 28th day of February, 1934 in the County of Douglas and State of Nebraska, Henry Hawk, alias Henry Hawks, alias Charles Henry, then and there being, then and there in and upon one Isadore Perelman, then and there being, unlawfully, feloniously, maliciously and forcibly did make an assault with the intent then and there forcibly and by violence and by putting him, the said Isadore Perelman, in fear, to take from the person and against the will of him, the said Isadore Perelman, the money and personal property of value of him, the said Isadore Perelman, and thereby then and there the said Isadore Perelman to rob, and the money and personal property aforesaid, to steal, take and carry away; and the said Henry Hawk, alias Henry Hawks, alias Charles Henry then and there did attempt unlawfully, feloniously, forcibly and by putting him, the said Isadore Perelman, in fear, to take from the person and against the will of the [fol. 28] said Isadore Perelman, the money and personal property of value of him the said Isadore Perelman, with the intent thereby then and there the said Isadore Perelman to rob and the money and personal property aforesaid, to steal, take and carry away, and the said Henry

Hawk; alias Henry Hawks, alias Charles Henry, whilst engaged in said attempt to perpetrate a robbery in and upon the said Isadore Perelman, feloniously, purposely and of his deliberate and premeditated malice, shot said Isadore Perelman with a revolver and as a result thereof he died on the 1st day of March, 1934; defendant thus committed murder in the first degree while attempting to rob:

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

Given.

John W. Yeager, Judge.

Instruction No. 2

The defendant has been arraigned on said information and has pleaded not guilty. The plea of not guilty by the defendant casts upon the State, the burden of establishing all of the material allegations and elements contained in said information, by the evidence, beyond a reasonable doubt, before you will be warranted in returning a verdict against him.

The law presumes the defendant innocent; this presumption partakes of the nature of evidence in favor of the defendant and continues throughout the trial until the said defendant has been proven guilty beyond a reasonable doubt.

Given.

John W. Yeager, Judge.

Instruction No. 3

By the term "reasonable doubt", as used in these instructions, is meant an actual doubt, one that you are conscious of having after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty and believe that you are acting in a reasonable manner, and if you believe that a reasonable man, in any matter of like importance would [fol. 29] hesitate to act because of such doubt as you are

conscious of having, then that is a reasonable doubt, of which the defendant is entitled to have the benefit.

Given.

John W. Yeager, Judge.

Instruction No. 4

The Criminal Code of Nebraska insofar as it is applicable to this case, is as follows:

"Whoever shall * * * in the perpetration of or attempt to perpetrate any * * * robbery * * * or causing the same to be done, kill another * * * every person so offending shall be deemed guilty of murder in the first degre, and upon conviction thereof, shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

Given.

John W. Yeager, Judge.

Instruction No. 5

The material elements necessary to be established by the evidence beyond a reasonable doubt in order to convict the defendant of the crime charged, are:

(1) That on or about the 28th day of February 1934 in the County of Douglas and State of Nebraska, the defendant herein alone, or with others, was engaged in, or in an attempt to commit a robbery;

(2) That while so engaged in such robbery or attempted robbery, in said county and State, the said Isadore Perelman was, on or about the 28th day of February 1934, shot, and that as a result the said Isadore Perelman died on or about the 1st day of March 1934;

(3) That either the defendant or some person engaged with him in the commission of such robbery or attempted robbery fired the shot or was instrumental in causing the shot to be fired which resulted in the death [fol. 30] of the said Isadore Perelman.

Should you find from the evidence beyond a reasonable doubt that the State has established each and all of the foregoing propositions then it will be your duty to convict the

defendant of murder in the first degree, and also to state in your verdict whether the defendant shall suffer death or be imprisoned in the penitentiary during life.

Otherwise, you should acquit the defendant of murder in the first degree.

Given.

John W. Yeager, Judge.

Instruction No. 6

"Robbery" as defined by our Statutes, is as follows:

> "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery."

An attempted robbery is a situation wherein one or more persons as-ault another with the purpose of committing a robbery but which attempt falls short of consummation as a robbery.

Given.

John W. Yeager, Judge.

Instruction No. 7

You are instructed that under the law where two or more persons engage in and upon a joint criminal enterprise each and all are equally accountable for the acts of the others while so engaged in and upon such enterprise.

Therefore, if you find by the evidence beyond a reasonable doubt, that the defendant herein and another engaged in the robbery or attempted robbery as charged in the Information, against the defendant, and that while so engaged the other person shot and killed Isadore Perelman, then it will be your duty to return a verdict of guilty against the defendant herein.

Given.

John W. Yeager, Judge.

[fol. 31] Instruction No. 8

The defendant has not taken the stand to testify in his own behalf as was his right under the law of this state. From this failure you are not permitted to and you shall

not consider this failure to testify either in favor of or against the defendant. You shall draw no inference of any kind whatever from such failure. The burden is on the State to convince you by the evidence beyond a reasonable doubt and this burden is neither increased nor lessened by the failure of the defendant to testify.

Given.

John W. Yeager, Judge.

Instruction No. 9

It is your duty to scrutinize carefully and to weigh dispassionately the testimony of all witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive.

Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering their interest, bias or prejudice; if any, and their means of knowing the matters concerning which they testify.

You are the sole judge of the credibility of the witnesses and of the weight to be given their testimony. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witnesses as absolutely true, if for any good reason it appears to you unreliable or untrue. Yet you have no right to reject the testimony of any of the witnesses without good reason and should not do so unless you find it unreconcilable with other testimony which you find to be true.

Given.

John W. Yeager, Judge.

Instruction No. 10

Upon retiring for deliberation, you will select one of your number foreman, who must sign your verdict when one is [fol. 32] agreed upon. For your convenience, forms of verdict will accompany these instructions. You must not separate until your verdict is returned in open court, or until you are discharged by the Court.

If you do not find the defendant guilty, your verdict will be a general one of not guilty.

If you find the defendant guilty of murder in the first degree, you will so state in your verdict, and you will then

also state in your verdict whether the defendant shall suffer death therefor, or whether he shall be imprisoned in the penitentiary during life.

Given.

John W. Yeager, Judge.

By the Court.

John W. Yeager, Judge.

Endorsed: Cr. App. DKT 39 No. 464, In District Court, Douglas County, Nebraska. The State of Nebraska, Plff., vs. Henry Hawk, alias Henry Hawks, alias Charles Henry, Dft. Instructions to the jury. Yeager, J. Filed in District Court Douglas County, Nebraska, Mar. 18, 1936. Frank McGrath, Cler-.

Afterward, at the February, 1936, Term of said Court, and on the 18th day of March, 1936, an Order was entered and Verdict returned herein, as appears on Journal 351, Page 186, which said Order and Verdict is in the words and figures following, to-wit:

39-464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant

Information: First Degree Murder While Attempting to Rob

TRIAL ORDER AND VERDICT

Now, on this day, again comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, is brought into Court in custody of the sheriff.

Thereupon comes the jury heretofore impaneled and sworn and the trial proceeds:

[fol. 33] The said jury having heard the remaining evidence adduced, and both parties resting, thereupon the State moves for dismissal of the second count of the in-

formation, upon full consideration whereof the Court sustains said motion; and

It is ordered that the second count of the information be and the same hereby is dismissed.

The said jury having heard the arguments of respective counsel and the instructions of the Court thereupon retired in charge of a sworn officer for deliberation. Afterwards, the said jury returned into open court with their verdict in writing, which said verdict is in the words and figures following, to wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

CR. DKT. 39 No. 464

THE STATE OF NEBRASKA, Plaintiff

vs.

HENRY HAWK, alias Henry Hawks, alias Charles Henry, Defendant

VERDICT

We, the jury duly impaneled and sworn to well and truly try and true deliverance make between the State of Nebraska and Henry Hawk, alias Henry Hawks alias Charles Henry, the prisoner at the bar, do find the said defendant Guilty, of murder in the first degree, in manner and form as charged in the information, and do fix the Penalty at imprisonment in the penitentiary during life.

Wilbur P. Spencer, Foreman.

Thereupon, at the request of defendant, the said jury was polled, and each juror upon being inquired of if the verdict as above returned was and is his verdict answered in the affirmative.

Whereupon the said jury was discharged from further consideration of this cause and the defendant is remanded to custody to await sentence.

[fol. 34] Afterward, on the 18th day of March, 1936, a Motion for New Trial was filed herein, which said Motion is in the words and figures following, to wit:

In the District Court of Douglas County, Nebraska

Doc. 39 No. 464

The State of Nebraska, Plaintiff

vs.

Henry Hawk, Defendant

Motion for New Trial

Comes now the defendant and moves the Court to grant a new trial in the above entitled case for the following reasons:

1. Errors of law occur-ing at the trial.

2. Errors of facts occur-ing at the trial.

3. Newly discovered evidence which the defendant exercising ordinary diligence was unable to produce at the trial.

4. That the judgment is contrary to the evidence.

5. Irregularity on the part of the witnesses for the State.

6. Irregularity on the part of the County Attorneys for the State.

Henry Hawks, By Joseph Lovely, His Attorney, John N. Baldwin.

Endorsed: Crim. Doc. 39 $n = 464$. In the District Court of Douglas County, Nebraska. State of Nebraska, plaintiff, vs. Henry Hawks, Defendant. Motion for New Trial. Attorneys for Defendant. Jos M. Lovely and John Baldwin Filed in District Court Douglas County, Nebraska Mar. 18, 1936 Frank McGrath Clerk.

Afterward, at the February 1936 Term of said Court, and on the 19th day of March, 1936, a Judgment and Sentence was entered herein, as appears on Journal 351 Page 196, [fol. 35] which said Judgment and Sentence is in the words and figures following, to wit:

INFORMATION

First Degree Murder While Attempting to Rob

39-464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, alias Henry Hawks, alias Charles Henry, Defendant

JUDGMENT AND SENTENCE

Now, on this day, comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, is brought into court in custody of guards of the Federal Penitentiary, Leavenworth, Kansas.

Thereupon this cause comes on for hearing upon the motion of said defendant for a new trial; upon consideration whereof, being fully advised in the premises, it is ordered by the Court that said motion be, and hereby is overruled.

Whereupon said defendant is arraigned for sentence and is informed by the Court of the verdict of the jury heretofore returned herein finding him, the said defendant, guilty of murder in the first degree, in manner and form as charged in the Information, and fixing the penalty at imprisonment in the penitentiary during life.

Thereupon said defendant is inquired of is he has anything to say why judgment should not be pronounced against him. Showing no good and sufficient cause why such judgment should not be pronounced;

It is, therefore, considered, ordered and adjudged by the Court that the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he is now serving therein he be by the Warden of [fol. 36] said Federal Penitentiary delivered into the custody of the Sheriff of Douglas County, Nebraska, and be taken by said Sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life,

no part of which said period of time is by virtue of this sentence to be spent in solitary confinement, and that he pay the costs of this prosecution, taxed at $—.

Afterward, on the 10th day of April, 1936, a Poverty Affidavit was filed herein, which said Affidavit is in the words and figures following, to wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, STATE OF NEBRASKA

Cr. Doc. No. 464

STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWKS, Defendant

POVERTY AFFIDAVIT

Comes now the affiant Henry Hawk, who was the defendant in the above-entitled cause and respectfully prays That This Honorable Court grant him leave to proceed with said appeal as an impecunious person.

Affiant further states that because of his poverty he is unable to pay the costs of such appeal to the Supreme Court of Nebraska, nor the costs in the District Court of Douglas County, Nebraska.

That he is unable to pay the costs of filing such appeal in this Court.

That affiant has no real or personal property to give as security for such costs.

Affiant is a citizen of the United States by birth and verily believes that he has a meritorius cause for appeal and is entitled to the redress prayed for therein.

[fol. 37] Wherefore, affiant prays that he be awarded the right to proceed with such appeal as an impecunious person as provided in such cases as provided by law.

And the affiant will ever pray.

Henry Hawk, Affiant Pro Se.

On this 6th day of April, A. D. 1936, the affiant Henry Hawk, appeared before me and on his oath stated that the

facts set forth in the above affidavit are true, subscribed and sworn to before me this the 6th day of April, A. D. 1936.

E. H. Eckholdt, Notary Public. (Seal:) My commission expires April 29, 1939.

Endorsed: 39-464 Filed in District Court Douglas County, Nebraska, Apr. 10, 1936. Frank McGrath, Clerk.

Afterward, at the February 1936 Term of said Court, and on the 10th day of April, 1936, an Order was entered herein, as appears on Journal 351 Page 308, which said Order is in the words and figures following, to wit:

INFORMATION: First Degree Murder While Attempting to Rob

39-464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, alias Henry Hawks, alias Charles Henry, Defendant

ORDER GRANTING LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS

Now, upon this 10th day of April, 1936, upon presentation and consideration of the affidavit and application of defendant therefor;

It Is Ordered that the Clerk of this Court, and the Stenographic Reporter respectively prepare and deliver to the defendant a Transcript of Proceedings and a Bill of Exceptions in this case at the costs of Douglas County, that said [fol. 38] defendant, in forma pauperis, may prosecute his appeal herein to the Supreme Court of the State of Nebraska.

By the Court.

John W. Yeager, Judge.

Afterward, on the 10th day of April, 1936, a Notice of Appeal was filed herein, which said Notice is in the words and figures following, to wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, STATE OF NEBRASKA

Ct. Doc. 39. No. 464

STATE OF NEBRASKA, Plaintiff

vs.

HENRY HAWK, Defendant and Appellant

NOTICE OF APPEAL

Comes now Henry Hawk in his own proper person, the above named defendant and hereby appeal to the Supreme Court of Nebraska, at Lincoln, Nebraska.

From the Final Judgment: Of the District Court of Douglas County, Nebraska.

Presiding Judge: Honorable John W. Yeager.

Offense: Murder in the first degree.

Date of Verdict: Guilty, March 19, 1936.

Brief Description of Judgment of Sentence: Confinement in the Nebraska State Penitentiary for life, and to pay the cost of the case.

Name Prison Where Now Confined: Federal penitentiary, Leavenworth, Kansas.

I, the above named appellant, hereby appeal to the Supreme Court of Nebraska at Lincoln, Nebraska, from the judgment above-mentioned on the grounds set forth below.

Henry Hawk, Appellant Pro se.

[fol. 39]

GROUNDS FOR APPEAL

1. Defendant alleges the jury was bias- and prejudiced.

2. That the Court erred in the admission of certain evidence, as appears by the transcript of record in said cause.

(Notice acknowledging receipt of copy of notice of appeal, filed April —, 1936.)

Received a copy of Notice of Appeal in the above-entitled cause this the — day of April, A. D. 1936.

James T. English, County Attorney, Douglas County, Nebraska.

Henry Hawk, Appellant Pro se.

Endorsed: 39-464. Filed in District Court Douglas County, Nebraska, Apr. 10, 1936. Frank McGrath, Clerk.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, Frank McGrath, Clerk of the District Court, in and for Douglas County in the Fourth Judicial District of Nebraska, do hereby certify that the foregoing is a true transcript of the record in the District Court in the case of The State of Nebraska against Henry Hawk, alias Henry Hawks, alias Charles Henry, containing the Information, Order of Arraignment, Trial Order, Instructions by the Court, Trial Order and Verdict, Motion for New Trial, Order Overruling said Motion and Judgment and Sentence, Poverty Affidavit, Order in Re Costs and Notice of Appeal.

In Witness Whereof, I have set my hand and affixed the seal of said Court at Omaha, this 27th day of April, A. D., 1936.

Frank McGrath, Clerk, by Alfred Kearney, Deputy.

[File endorsement omitted.]

[fols. 40-44] [AFFIDAVIT OF POVERTY AND MOTION FOR ORDER ALLOWING SUBPOENA OF AN SUMMONS OF WITNESSES WITHOUT PREPAYMENT OF FEES AND COSTS OMITTED IN PRINTING]

[fol. 45] [Acknowledgement of Service of Petition for Writ of Habeas Corpus etc. omitted in printing]

[fol. 46] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF HABEAS CORPUS—Filed March 17, 1944

To the Honorable J. L. Polk, Judge of the above entitled court, Presiding:

Comes now Henry Hawk, the petitioner in the above entitled and numbered cause of action, and moves the Court for an Order to amend his petition by striking therefrom his statement of prejudice against any of the judges of the Court, and for cause states as follows:

I

The Clerk of the Court on March 14, 1944, informed your petitioner the movant herein, that your Honor presented the above entitled and Numbered cause of action to his Honor Fred Shepherd, a Judge of this Court for adjudication and he refuses to intertain the matter.

[fol. 47] II

Petitioner by reason of the foregong, elects to have the Court assign the matter to any one of the Judges of the Court that will agree to intertain the petition and adjudicate the matter as law and justice may require, or in the alternate your Honor intertain the above entitled numbered cause, and if for any reason no Judge of the Court will intertain the said cause, in the alternate certify the matter to the Supreme Court of Nebraska for any orders that are appropriate in the premises.

Wherefore, Henry Hawk, the petitioner and movant herein, prays that the affidavit of prejudice be stricken and any Judge of the Court be qualified to intertain the above cause, and if prejudice still remains against petitioner by the Judges of the Court and that said Judges refuse to intertain the petition; in the alternate let the Court issue an order certifying the above entitled Numbered cause to the Supreme Court of Nebraska, for any orders of that Honorable Court that are appropriate in the premises.

Respectfully submitted, Henry Hawk, in persona.

[File endorsement omitted.]

In the District Court of Lancaster County.

[Title omitted]

Letter of Fairness

March 15th, 1944.

To the Honorable Fred Shepherd, Judge of the above entitled Court:

[fol. 48] Dear Sir:

The Clerk of the Court W. Claude Burcham, informs me that your Honor refused to intertain my petition for writ of Habeas Corpus in the above entitled and Numbered

cause and ask for an order, in the matter. Which I have prepared and am forwarding the Court.

My Dear Sir, I am again thankful for your frank and honest judicial manner in which you have shown your honesty and honor in refusing to intertain a matter in which no doubt you thought you could not act because of prejudice, how wonderful it would be to know and feel that every judge was so fair and honest and open and ready to go down on record with such matters, as by law made and provided. I read to my sorrow that you have refused to run for re-election and like all good people that have known you the manny years of service rendered that the public is to lose a valuable servant and I trust that only the one choosen to take your place will conduct himself accordingly.

I would greatly appreciate a letter from you in reply for the sole reason to cherish as a matter of record in my files, and if you had time some day to interview me as I would like to show you that I have facts that some day may interest you to present to the proper authorities in order that poor defens-less, and ignorant litigants would never be again deprived of their liberty without due process of law, as was said by the Court in Ex parte Hawk, 319 U. S. —, 64 Sup. Ct. Rep. 448, 451.

Yours very respectfully, Henry Hawk, #13274, State Penitentiary.

(Kindly file this letter.)
Copy HH.

Endorsed: X-126—Clerk's Office, District Court, Lancaster County, Nebraska—Filed Mar. 20, 1944—W. C. Burcham, Clerk District Court.

[fol. 49] [Assignment for trial omitted in printing]

IN THE DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

"Fred Shepherd, Judge of the District Court, Third Judicial District of Nebraska, Lincoln, Nebraska

March 20, 1944.

HENRY HAWK, Lancaster, Nebraska

DEAR SIR;

The clerk of the court, Mr. W. C. Burcham, correctly reported what I said when he brought in your present application for writ of habeas corpus. I have, as he stated, the [fol. 50] equity side this year and it keeps me very busy. The habeas corpus cases fall on the law side and there are three judges assigned to the work there. Accordingly, I told him to go and get a law judge.

You will doubtless remember that I had your first application for habeas corpus (I think it was your first in this court) and turned it down on the theory that it did not state a cause of action. My ruling was affirmed by the Supreme Court of the state and an opinion was writ-en by Judge Eberly. You will find it at page 639 of Vol. 137 of the Nebraska Reports. After that I think you went to the Supreme Court of the United States and that the ruling of the state court was there affirmed. I may be mistaken in regard to some of the details but unless there is something very new and different in your present application it would seem to me that what transpired on the first trip to the high court should be convincing to me that I was not in error in my first judgment.

I have given your letter to clerk Burcham. I have no doubt that the assignment judge on the law side, judge Polk, will take your case himself or send it to another judge in this or another district.

Yours very truly, (S.) Fred Shepherd. FS: EH".

EXHIBIT "B"

Endorsed: X-126—Clerk's Office, District Court, Lancaster County, Nebraska. Filed Mar. 27, 1944. W. C. Burcham, Clerk District Court.

Henry Hawk, #13274,
State Penitentiary,
Lancaster via Lincoln, Nebraska.

Honorable Fred Shepherd, Judge, District Court, % Court House, Lincoln, Nebraska.

March 24, 1944.

DEAR SIR:

Re Hawk v. Olson, No. X-126 H. C.

Your letter of March 20, received and contents carefully noted.

I note that you say in your letter that the status of my confinement in the Nebraska State Penitentiary had in no way [fol. 51] been altered since you and Judge Eberly reviewed the matter as more fully appears in Hawk v. O'Grady, 137 Neb. 639, 290 N. W. 910, 911, 912, as far as concerns your knowledge.

May I very respectfully draw your attention to the fact that the Supreme Court of the United States on January 31, 1944, held that your ruling and opinion of Judge Eberly was not worthy of consideration and ordered me to petition the court as I did for my release and also held that my trial, Conviction and Commitment was unconstitutional and void, and ordered my release as was incumbent upon the courts of Nebraska or in the alternate the Federal Courts were under no obligation to release me due to the evidence of fact that there was a breakdown in the administration of justice in the Courts of Nebraska. Compare, Ex parte Henry Hawk, 64 Sup. Ct. Rep. 448, 451.

Surely it is very evident from the opinion of the Supreme Court of the United States in my case, that both the courts and Judges of the Federal and State Courts are either ignorant of the science of law or have invented ways and means especially designed to prevent injustice, or I would have been released years ago, might not it be possible that every official in Nebraska with knowledge of my illegal confinement be subject to prosecution by the Federal Government for conspiracy to kidnap me and conceal me in the

Nebraska State Penitentiary, in violation of Title 18, Section 408 (a) of the United States Criminal Code as amended May 18, 1934?

I especially brought out the facts to you in my petition which you refused to intertain.

And let me repeat that in spite of all these circumstances, you have never hesitated to make your actions a matter of record and I must say that you will always have my respects as a man that is to be respected, and you do have my personal respects, for your actions are always open for review and not hidden from the public as were the records of my conviction and which records I was forced to appeal to the federal court in order to ever obtain them as Mr. Robert [fol. 52] A. Nelson will tell you as he got those records for me. As you no doubt but know that Mr. Nelson is now assistant Attorney General of Nebraska.

With kind regards and best wishes I remain very respectfully,

Henry Hawk.

Copy 4: HH.

P.S.: Mr. Burcham, please present to his Honor Fred Shepherd.

Endorsed: X-126—Clerk's Office, District Court, Lancaster County, Nebraska. Filed Mar. 27, 1944. W. C. Burcham, Clerk District Court.

In District Court of Lancaster County

X-126

Henry Hawk, Petitioner

vs.

Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

Journal Entry of Judgment—March 29, 1944

This matter comes before the court upon the petition for writ of habeas corpus, affidavit of poverty and motion for order allowing subpoena of and summons of witnesses without prepayment of fees and costs, and the motion for an order to amend said petition, all filed by the petitioner

herein, and the court, having fully and carefully examined said petition and motions and the documents attached thereto, finds that said petition does not state facts sufficient to constitute a cause of action in favor of petitioner and against the respondent; and that, accordingly, the said petition should be dismissed for want of merit and for failure to state a cause of action, and said writ of habeas corpus prayed for in said petition denied.

And the court further finds from an examination of said petition and motions, and from the records of this court, that the issues presented for determination in said petition have been heretofore fully and finally adjudicated between the [fol. 53] petitioner herein and the respondent herein and the latter's predecessor in office in a similar action filed by petitioner in this court, being Docket V-98 of this court, which said action was dismissed by this court, and was thereafter appealed by petitioner to the Supreme Court of the State of Nebraska, being No. 30708 in said court, and said judgment in said action having been affirmed in said appeal by the Supreme Court of Nebraska by opinion published, 137 Neb. 639, which decision of the Supreme Court of this state remains unreversed and unmodified, with petition for writ of certiorari in said case denied in the Supreme Court of the United States, Hawk v. O'Grady, 311 U. S. 645, 61 Sup. Ct. 11, 85 L. Ed. 412.

The court further finds from an examination of said petition and the records of this court that all of the allegations, facts and issues, presented by plaintiff in said petition now before the court have been duly alleged, presented and fully adjudicated between this petitioner and the respondent herein, and his predecessor in office, in a previous action filed by said petitioner in this court, being numbered Docket W, pg. 124 in this court, wherein petitioner petitioned for a writ of habeas corpus, alleging the same grounds and facts and presenting the same identical issues and all of them as are now presented and alleged in the petition now under consideration of this court, and that all of said issues have been fully and finally adjudicated between said parties and adversely to said petitioner, being the petitioner herein, in said action, in which said petition for habeas corpus of the petitioner was dismissed by this court by the following order, to wit: "18 District Court Journal "158" Lancaster County, Nebraska, September Term, 1941, October 28, 1941, Thirty-eighth Judicial Day. Tuesday Court

met pursuant to adjournment of Monday, October 27, 1941. Present the same officers of the Court as on Monday, the 27th inst. And on this day the following proceedings were had and done. Before the Honorable Fred Shepherd, Judge Presiding, Henry Hawk, vs. Neil Olson, Warden of the [fol. 54] Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska; W-124. This case was on the 28th day of October assigned to me, Fred Shepherd, one of the judges of the District Court of the Third Judicial District of Nebraska by J. H. Broady, the assignment or presiding judge of said court for the present year. The Court finds upon examination of the petition and record together with the brief attached thereto, and from a careful consideration of the same that said petition does not state facts sufficient to constitute a cause of action in favor of the petitioner and relator and against the respondent; and that accordingly the said petition should be dismissed at the costs of said petitioner and relator, taxed at $——, for which execution is hereby awarded. And the Court finds in the second place that this is a cause adjudicated, the precise case under the same title concerning the identical persons and covering the same subject matter having been considered by this court under its then docket number V-98 of this court and therein dismissed, and having soon thereafter been considered on appeal in the Supreme Court of Nebraska in No. 30708 of its cases and that the judgment of this court was therein affirmed with opinions published in Vol. 137 of the Nebr. Report at page 639, which decisions of the State Supreme Court remains unreversed and unmodified, with petition for writ of certiorari denied in the Supreme Court of the United States and this court further finds that in consequence of the foregoing the above entitled case should be dismissed as a case heretofore dismissed in all the courts in the direct proceeding at the costs of the petitioner and relator. Wherefore, the Court so dismisses the petition as a cause adjudicated at the costs of petitioner and relator, taxed at $——, for which execution is hereby awarded. To the above dismissal, whether on grounds of res adjudicata or because the petition fails to state a cause of action, and to all of the findings the petitioner and relator duly excepts and his exceptions are duly noted. Motion of petitioner that date be set for hearing is overruled by the Court for the reasons indicated in the dis-

missal of the petition, to which petitioner and relator duly excepts."

[fol. 55] That said previous judgment of this court dismissing the petition for writ of habeas corpus of this petitioner in said previous action, Docket W-124, was not appealed, because final, and is in full force and effect and constitutes a full and complete and final adjudication of all rights, claims, issues and contentions of the petitioner herein presented by the petition now filed and under consideration wherein petitioner prays for the issuance of a writ of habeas corpus.

It Is Therefore Ordered and Adjudged By the Court that the petition in this action be and hereby is dismissed, and the writ of habeas corpus prayed for by said petitioner be and hereby is denied, all at the costs of petitioner taxed at $——, for which execution is hereby awarded.

Signed at Lincoln, Nebraska, this 29th day of March, 1944.

By the Court,

Ralph P. Wilson, District Judge.

In the District Court of Lancaster County

[Title omitted]

News Paper Clipping.—Filed March 30, 1944

To the Clerk of the Above Entitled Court:

The following is a news paper clipping taken from the Lincoln Nebraska "Star" monday March 27, 1944, page seven colum two, kindly file same as Exhibit "C" in the above entitled Numbered cause of action.

[fol. 56] 'Liberties Must Be Guarded,' Says Simmons at Omaha

Omaha, March 27—Speaking before members of the Omaha Woman's Club Monday on the establishment of constitutional government in the United States, Chief Justice Robert G. Simmons, of the Nebraska Supreme Court said:

"There are those who seem to think that we can safely surrender one or more liberties (those others prize) and keep the ones in which we have a particular interest.

"Whenever a means is devised or a method approved that permits our officials to violate or ignore one constitutionally guaranteed right, then the same plan may be used to invade other rights, and constitutional liberties are gone. The strength of constitutional government lies in the cohesion of many separate provisions built into a complete whole.

"Support by the people of the whole system and fealty and obedience to constitutional mandates must be strictly observed by executives, legislatures and courts."

(Exhibit "C")

[File endorsement omitted.]

[fols. 57-58] Notice of Appeal omitted in printing.

[Praecipe for Transcript of Record omitted in printing.]

[fols. 59-60] Clerk's Certificate to foregoing transcript omitted in printing

[fols. 61-62] [Brief of Appellant—Filed April 29, 1944, omitted in printing]

[fol. 63] In the Supreme Court of Nebraska

Henry Hawk, Appellant,

vs.

Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Appellee

Motion to Dismiss—Filed May 2, 1944

Comes now the appellee, and appearing specially and for the purpose of this motion only, moves the court to dismiss the appeal herein for the reason that this court does not have jurisdiction of the subject matter of this action, because no final order has been entered in the court below

from which an appeal will lie, as affirmatively appears by the transcript heretofore filed herein.

Walter R. Johnson, Attorney General; by (Signed) John H. Comstock and Rush C. Clarke, Assistant Attorneys General, Attorneys for Appellee.

[File endorsement omitted.]

[fols. 64-65] IN THE SUPREME COURT OF NEBRASKA

[Title omitted].

NOTICE OF MOTION TO DISMISS—Filed May 4, 1944

The above named appellant will take notice that the appellee, appearing specially, has filed his motion to dismiss appeal, copy of which is hereto attached, in the above entitled cause and court and that the appellee will on the 5th day of June, 1944, at nine o'clock a. m., or as soon thereafter as counsel may be heard, in the Supreme Court room in Lincoln, Lancaster County, Nebraska, apply to the court for a hearing on said motion.

Dated this second day of May, 1944.

Walter R. Johnson, Attorney General, by (Signed) John H. Comstock and Rush C. Clarke, Assistant Attorneys General, Attorneys for Appellee.

STATE OF NEBRASKA,
Lancaster County, ss:

I hereby certify that on the 3rd day of May, 1944, I served the within writ of Notice on the within named Henry Hawk, by delivering to him in person a true and certified copy of this writ with all endorsements thereon, together with copy of Motion. All done in Lancaster County, Nebraska, as required by law.

Myles Holloway, Sheriff (Signed) Leonard Schafer, Deputy.

[File endorsement omitted.]

[fol. 66] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

OBJECTIONS TO MOTION TO DISMISS—Filed May 5, 1944

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of Nebraska:

Comes now the Appellant, Henry Hawk, the Movant herein and moves the Court for an order overruling the Appellee's Motion to dismiss the Appellant's Appeal in the above entitled and Numbered cause of action, for the following good and sufficient reasons to-wit:

1. The Appellee through his Counsel on the 5th day of May, 1944, filed in this Court a Motion to dismiss the above entitled and numbered cause, for the reason that this Court has no jurisdiction of the subject matter of said cause, because no final order has been entered in the court below from which an appeal will lie, as affirmatively appears by the transcript heretofore filed herein.

2. It is well settled in law as in the case at bar, that:

> "Where notice of appeal properly given in district court, supreme court acquires jurisdiction when transcript filed, without further notice being required. Marvel v. Craft, 116 Neb. 802, 219 N. W. 242."

3. "Habeas corpus cuts through all forms of procedure and goes to the very h-art and substance of the matter." Compare, Frank v. Mangum, 237 U. S. 309. See also, Ex parte Henry Hawk, —— U. S. ——, 64 Sup. Ct. Rep. 448, 451.

4. The Fourteenth Amendment of the Constitution of the United States as far as here material declares that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, * * * without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 67] 5. The Supreme Court "shall have appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees

of the district courts, in all matters of law, facts, or equity, where the rules of law or the principles of equity appear from the files, exhibits or records of said court to have been erroneously decided." Compare, Chapter 27-204 Compiled Statutes of Nebraska, for 1929, Annotated.

Wherefore, Appellant the Movant herein having shown that under the circumstances disclosed by the law and the facts that this Court has jurisdiction to entertain the appeal and adjudicate the subject matter, Appellant prays that an order issue denying Appellee's motion to dismiss said appeal, and afford Appellant due process and equal protection of the laws, and the right to be heard in this Court in said cause, in accordance with the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, supra. And Appellant will ever pray

Respectfully submitted, (Signed) Henry Hawk, in persona.

[fols. 68-70]

Henry Hawk, #13274,
State Penitentiary,
% P. O. Box 111, Lincoln, Nebraska.

Hon. George H. Turner, Clerk, Supreme Court of Nebraska,
% State Capitol Bld'g, Lincoln, Nebraska.

May 4, 1944.

DEAR SIR:

In re: Hawk v. Olson, No. 31841

Enclosed herewith I hand you appellant's answer to Appellee-s Motion to dismiss the above entitled and Numbered cause of action.

I respectfully request that you file said document and present the matter to the Court for its consideration, and acknowledge receipt of same by return mail.

I am sending Appellees Counsel a copy under seperate cover by registered mail and will forward proof of service.

Yours very respectfully (Signed) Henry Hawk.

Copy HH.

[File endorsement omitted.]

[fols. 71-72] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING MOTION TO DISMISS—June 5, 1944

This cause coming on to be heard upon motion of appellee to dismiss the appeal herein, together with objections of appellant thereto, was argued by counsel and submitted to the court; upon due consideraton whereof; it is by the court ordered that said motion of appellee to dismiss appeal be, and hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 73-74] [BRIEF OF APPELLEE—Filed September 7, 1944, omitted in printing]

[fols. 75-76] IN SUPREME COURT OF NEBRASKA

ORDER OF SUBMISSION—September 22, 1944

The following causes were argued by counsel and submitted to the Court:

* * * * * * * *

* No. 31841. Hawk v. Olson, Appeal, Lancaster County.

* Yeager, Judge, not participating.

Robert G. Simmons, Chief Justice.

[fols. 77-78] IN SUPREME COURT OF NEBRASKA

Appeal from the District Court of Lancaster County.
No. 31841

HENRY HAWK, Appellant,

v.

NEL. OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Appellee

JUDGMENT—November 3, 1944

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof,

the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fol. 79] IN SUPREME COURT OF NEBRASKA

31841

HAWK

v.

OLSON

1. The fact that a defendant in an information is in prison, serving a sentence for another crime, gives him no immunity from prosecution.

2. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be de[illegible]d.

3. The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus.

4. A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose.

5. Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error.

[fol. 80] 6. Every person accused of crime should be afforded reasonable opportunity to marshall his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated.

[fol. 81] Heard before Simmons, C. J., Paine, Carter, Messmore and Wenke, JJ.

Opinion—Filed November 3, 1944

Wenke, J.:

This habeas corpus proceeding was instituted in the district court for Lancaster county by the petitioner, Henry Hawk, against Neil Olson, warden of the Nebraska state penitentiary, as respondent, to obtain the petitioner's release. From an order denying the writ the petitioner has appealed to this court.

The petitioner's petition discloses that a complaint was filed against him in the municipal court of the city of Omaha containing two counts charging him with first degree murder. Preliminary hearing thereon was had on February 11, 1936, and on the same day he was bound over to the district court. Information to the same effect was then filed in the district court on February 17, 1936. On March 16, 1936, after being arraigned and pleading not guilty, the defendant was tried to a jury. By the verdict of the jury, rendered on March 18, 1936, he was found guilty of murder in the first degree, which verdict fixed the penalty at imprisonment in the penitentiary during life. On March 19, 1936, after motion for new trial had been overruled, the court, as provided in the verdict, sentenced the petitioner to the Nebraska state penitentiary for the period of his natural life. He is confined and is being held in said institution pursuant thereto.

This court, in Hawk v. O'Grady, 137 Neb. 639, 290 N. W. [fol. 82] 911, has determined the validity of the form of the judgment entered by the trial court.

Petitioner complains that at the time he was tried he was a federal prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas, and therefore outside of the jurisdiction of the state. Further, that when he had completed his term in the federal prison he was turned over to the Nebraska authorities and confined in the state penitentiary without further order. These contentions are without merit.

The petition states that he was brought to Omaha for trial by the federal authorities and then returned by them to the federal prison; and that when his term in the federal penitentiary expired the federal authorities turned him over to the state authorities. As stated in Ponzi v. Fessenden,

258 U. S. 254, 42 S. Ct. 309, 22 A. L. R. 879; "* * * the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. * * * 'The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.'" As stated in Rigor v. State, 61 Atl. 631 (101 Md. 465): "That accused is serving a sentence under a prior conviction of a distinct crime is no ground for postponing his trial until the expiration of such sentence." See, also, Cato v. Smith, 104 Fed. 2d 885; Kelley v. Oregon, 273 U. S. 589, 47 S. Ct. [fol. 83] 504. And in Ponzi v. Fessenden, *supra*: "Nor, * * * is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite v. Commonwealth, 11 Metc. 581, 585, an opinion by Chief Justice Shaw; Ex parte Ryan, 10 Nev. 261, 264; Thomas v. People, 67 N. Y. 218, 226."

Many of the petitioner's grounds for release are pleaded in the form of conclusions. The petitioner must set forth the facts from which it is made to appear he will be entitled to discharge. See In re Application of Tail, Tail v. Olson, 145 Neb. ——, —— N. W. ——.

"In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ will be denied for it would be useless to go through the procedure of granting the writ and having the party brought before the court merely to be remanded back to the custody out of which he seeks to be discharged. Since the allegations of the petition are often inconclusive and mere statements of conclusions of the pleader the court may refuse to issue the writ if, upon the [fol. 84] face of the petition, it appears that the party is not entitled thereto." In re Application of Tail, Tail v. Olson, *supra*.

The petitioner questions the sufficiency of the evidence to sustain his conviction and says he is innocent. "'The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus.' Smith v. An-

rine, 156 Kan. 486, 134 Pac. 2d 409." In re Application of Tail, Tail v. Olson, *supra*. See, also, Carlsen v. State, 129 Neb. 84, 261 N. W. 339.

The petitioner sets forth parts of the evidence taken at the time of trial and attempts to show that the same are contradictory, conflicting, impeached, incompetent, and uncorroborated; that the state was permitted to impeach its own witnesses; that the court overruled his motion for continuance made after he had been arraigned and pleaded not guilty but before trial; and that there was error in the instructions given by the court. "Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error." In re Application of Maher, North v. Dorrance, 144 Neb. —, 13 N. W. 2d 653. "A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void." [fol. 85] State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497. "A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose. Michaelson v. Beemer, 72 Neb. 761." In re Application of Cole, Cole v. Fenton, 146 Neb. 802, 174 N. W. 509.

The petitioner refers to the testimony of certain witnesses as being perjured and other witnesses as having been intimidated or bribed. These statements are mere conclusions. They do not set forth facts which, if true, would entitle him to relief. However, if sufficient facts were set forth to entitle him to relief on this basis his remedy would not be by habeas corpus. The writ of error *coram nobis* has been recognized in this state. Carlsen v. State, *supra*. The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment. As stated in Carlsen v. State, *supra*; "* * * the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. * * * Habeas

corpus is not a proper remedy to release one from prison who has been wrongfully convicted."

Petitioner complains of his inability to perfect his appeal. On April 10, 1936, he filed notice of appeal and affidavit of poverty with the trial court. On the same day the [fol. 86] court ordered a transcript and bill of exceptions to be made at the county's expense. Petitioner says these were impounded and concealed and never delivered to him, but he fails to state in what manner they were impounded and concealed. The bill of exceptions was subsequently found in the office files of the county attorney of Douglas county. No petition in error was ever filed in the supreme court. He alleges he was deserted by his counsel. However, the petitioner fails to show that he ever requested the public defender or his assistant to appeal. He alleges that in order to perfect his appeal he petitioned the supreme court for additional time, mandamused the trial court and brought mandamus in the district court of the United States, Lincoln Division, but all were denied. The facts alleged do not show that the petitioner was prevented from perfecting his appeal within the time provided by our statute. "Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error." Carlsen v. State, *supra*.

The petition sets forth that on the evening before his arraignment the public defender and his assistant consulted with the petitioner and advised him to enter a plea of guilty to having murdered Isadore Perelman during an attempted robbery on the evening of February 28, 1934, because the county attorney and captain of detectives had arranged to use the testimony of two convicts who were going to testify against him and that if he was convicted by a [fol. 87] jury he would no doubt receive a death sentence. He informed the public defender and his assistant that he would not plead guilty. They then informed him they would have nothing to do with the trial scheduled the next morning.

When arraigned on the following morning the petitioner pleaded not guilty and in the trial, held on March 16, 17 and 18, he was represented by the public defender and John N. Baldwin. We can see nothing in these facts, if true, that in any way prevented the petitioner from having a fair trial.

Petitioner complains of the Court's overruling his motion for continuance and thereby denying him time to consult

counsel, examine the charge, subpoena witnesses, prepare a defense and thus giving him only a mere semblance of a trial. The record discloses that preliminary hearing was had on February 11, 1936. That over a month later, on March 16, 1936, he was arraigned on the same charge. He was brought to Omaha the day before and consulted with and was represented by the public defender and his assistant. The trial lasted for three days, March 16, 17 and 18. He was found guilty by the verdict of the jury. Motion for new trial was filed and overruled on March 19 and judgment on the verdict sentencing the defendant was had the same day. "Every person accused of crime should be afforded reasonable opportunity to marshall his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated." Hubbard v. State, 65 Neb. 805, 91 N. W. 869. The petitioner does not set forth any facts to [fols. 88-89] establish his innocence that he was prevented from establishing which, if continuance had been granted, he could have presented. He merely says he is innocent and criticizes the evidence upon which he was convicted. We find there is no merit to petitioner's contention.

For the reasons herein discussed the order of the lower court in denying the writ was correct and is therefore affirmed.

Affirmed.

Chappell, J., participating on briefs.

[fol. 90] [Notice of appeal omitted in printing]

[fol. 91] [Jurisdictional Statement omitted in printing]

[fol. 92] [Motion to stay the mandate omitted in printing]

[fols. 93-95] [Affidavit of poverty and motion for an order of the court allowing preparation of transcript of record on appeal to the Supreme Court of the United States without prepayment of costs or clerk's fees omitted in printing]

[fols. 96-98] [Praecipe for transcript of record omitted in printing]

[fols. 99-100] [Order staying mandate etc. omitted in printing]

[fol. 101] [Acknowledgement of service of appeal papers omitted in printing]

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—April 23, 1945

On Consideration of the motion for leave to proceed herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 49,278. Nebraska, Supreme Court. Term No. 825. Henry Hawk, Petitioner, vs. Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed January 9, 1945. Term No. 825 O. T. 1944.

FILE COPY

Petition not printed

Office - Supreme Court, U. S.
FILED
SEP 26 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No brief for resp. on merits

No. 17

HENRY HAWK,

Petitioner,

vs.

NEIL OLSON, WARDEN, ETC.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PETITIONER

JOSEPH A. FANELLI,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 17

HENRY HAWK,

Petitioner,

vs.

NEIL OLSON, WARDEN, ETC.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court of Lancaster County, Nebraska, is set forth in the record (R. 37-40). The opinion of the Supreme Court of Nebraska (R. 46-51) is reported in 145 Neb. —, 16 N. W. (2d) 181.

Jurisdiction

The judgment of the Supreme Court of Nebraska was entered on November 3, 1944 (R. 45). The petition for a writ of certiorari was filed on January 9, 1945, and granted on April 23, 1945 (R. 52). An order granting petitioner

leave to proceed *in forma pauperis* was entered on April 23, 1945 (R. 52). The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Petitioner was charged with first degree murder. He is poor and ignorant. He first got public counsel, at the very earliest and then in rather loose fashion, at 11 o'clock of the night before his arraignment and trial. He was arraigned the following morning at nine. Upon the arraignment followed an immediate trial. The trial endured three days. The death penalty was avoided, but a sentence for life was imposed. It was entered four days after petitioner was brought into the State of Nebraska to answer to the charge of first degree murder. The first question presented is whether petitioner's application for *habeas corpus* which sets forth the foregoing facts, together with allegations stating that public counsel did not begin to act in the case until the jury was partially or completely selected, is sufficient to entitle petitioner to a hearing upon the contention that he was forced into trial for a capital offense with such expedition as to deprive him of the effective assistance of counsel in violation of the Fourteenth Amendment to the Constitution.

2. Whether petitioner's application for *habeas corpus* which alleges in supporting detail and *in haec verba* that his conviction "was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials" is sufficient to entitle him to a hearing upon the contention that in this respect, too, he was deprived of the fair trial guaranteed him by the Fourteenth Amendment. Subsidiary to this question is an incidental question of whether the Court below disposed of petitioner's perjury contention upon an adequate state ground.

3. Immediately after his conviction for first degree murder in Nebraska, petitioner was returned to the Federal Penitentiary at Leavenworth, Kansas, to continue his confinement under an earlier federal conviction. He was deserted by counsel. Proceeding without counsel, he filed a timely notice of appeal in the trial court, and asked leave to proceed as a pauper, which was granted. The trial court ordered its clerk and court reporter to prepare and deliver to petitioner a Transcript of Proceedings and a Bill of Exceptions so that he might prosecute his appeal. But for some reason best known to the trial court and prosecuting officials these appeal documents were impounded and "consealed" (sic) and never delivered to petitioner. Time for appeal expired as petitions to the Supreme Court of Nebraska for an extension of time and for mandamus to the trial court for production of the appeal documents failed. Some nine months later advice was received from the court reporter that the County Attorney (prosecuting official at the trial) had the Bill of Exceptions "in his file". The third question presented is whether petitioner's application for *habeas corpus* which sets forth the foregoing facts is sufficient to entitle him to a hearing upon the contention that he was deprived of the appeal provided by the statutes of Nebraska in violation of the "equal protection" clause of the Fourteenth Amendment.

4. Petitioner against his will was, upon parole from the federal penitentiary at Alcatraz, forcibly seized in California and conveyed to Nebraska by Nebraska officials and kept imprisoned in Nebraska without regard to the governing law of that State. The fourth question presented is whether petitioner's application for *habeas corpus* which alleges the foregoing facts is sufficient to entitle petitioner to a hearing upon the contention that in this respect, too, he was deprived, in violation of the Four-

teenth Amendment, of the equal protection of the law of Nebraska. That law, in our view, accords to others similarly situated the right to release on *habeas corpus* in like circumstances.

Constitutional Provisions Involved

Section 1 of the Fourteenth Amendment to the Constitution provides, so far as is material here:

> "* * * nor shall any State deprive any person of life, [or] liberty * * * without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Petitioner, Henry Hawk, began this proceeding on March 10, 1944 by filing in the District Court of Lancaster County, Nebraska, a petition for a writ of *habeas corpus* directed against respondent, warden of the Nebraska State Penitentiary located in that county (R. 1). Petitioner was then serving his seventh year of a sentence for life imposed upon a Nebraska conviction for murder in the first degree. Imprisonment in respondent's custody has continued under that sentence (R. 2; 12; 15). The petition based in the Fourteenth Amendment sought a hearing upon allegations of violations of that Amendment in petitioner's commitment, trial, conviction, and imprisonment (R. 15). Attached to the petition as an exhibit (R. 15-32) is a copy of a certified transcript of the record of the murder trial. The petition makes frequent reference to that transcript as it does also, at times by page number, to certified transcripts of the testimony taken at such trial and the preliminary hearing which preceded it. These documents are not attached to the petition. However, they are set forth in the records of the Court as Exhibits A and C to petitioner's motion for leave to file a petition for *habeas corpus* in *Ex*

Parte Henry Hawk, No. —— original, Oct. Term 1942, 318 U. S. 746; and, in view of respondent's charge (Respondent's Brief "In Resistance," p. 17) that petitioner "is withholding this evidence from the court" we invite reading of all of the official record and will in summarizing the petition give additional record references for its allegations to the transcripts of testimony taken at the trial and preliminary hearing. Where there are slight variations, natural in the working of a human memory, between the petition and the official record, we follow the record in the text and give petitioner's allegation in the margin. So proceeding, and reordering Henry Hawk's allegations so as to make coherent the discursive and ungrammatical statements of an ignorant layman, we come then to the pertinent facts he alleged.

I. The Application for Habeas Corpus

Petitioner was on February 11, 1936 a federal prisoner at Leavenworth, Kansas. On that day he was brought by federal officers before a Nebraska magistrate in Omaha, Nebraska, where at 2 PM of the same day there ensued a preliminary hearing upon a complaint of first degree murder while attempting to rob (R. 2; P. H. 1).[1]

At the preliminary hearing, the County Attorney and Deputy County Attorney represented the State (P. H. 1). No one represented petitioner (R. 2; P. H. 1 ff.). Not inconsistently with the official record which shows no counsel for petitioner, he alleges that the magistrate "deprived your Petitioner of his fundamental right of a continuance within which to consult with counsel and prepare a defense, and forced your Petitioner to proceed without the assistance of counsel or other defense" (R. 2).

[1] "P. H." references are to pages of the transcript of the preliminary hearing. "T." references will be used to designate pages of the transcript of the testimony at the murder trial.

Petitioner claimed at the preliminary hearing that he was not guilty of the offense charged in the complaint (R. 2; P. H. 1).[2]

The State called three witnesses. Their names were De Santi, Nowicki and Taylor. The newspapers had reported the shooting of one Perelman, a grocer, in the course of a robbery on February 28, 1934. De Santi, a tavern-keeper, testified that he saw petitioner at De Santi's place of business talking with Nowicki and Taylor before the time of the shooting, and that later during the night he saw each of the three again at his place of business (R. 6; P. H. 2-11). Nowicki testified that petitioner and Taylor wanted to borrow a gun from him, which he did procure for them, and that he drove petitioner and Taylor to the vicinity of Perelman's store and waited for their return from the project of holding up Perelman (R. 7; P. H. 12-23).

Taylor admitted he shot Perelman while trying to rob him in a joint enterprise conceived and guided by Nowicki. But he denied that petitioner was involved in any way. The State proceeded to impeach him by use of an alleged prior statement by Taylor that Hawk was involved (R. 7-8; P. H. 24-47).

The State rested (P. H. 47). Petitioner, representing himself, called one witness for the defense, Captain Franks of the Omaha Police Force. He was questioned by the County Attorney, but not by petitioner. He testified that Taylor had made the prior contradictory statement implicating petitioner (P. H. 48-49).[3]

Petitioner appears to allege that the State called one additional witness at the preliminary hearing, a Dr. C. J.

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[2] Petitioner, a layman who could not be expected to know any better, calls this an "arraignment." However, in Nebraska the arraignment on a murder charge is the procedure for taking the plea to an information or indictment so charging, which in this case came later.

[3] Later at the jury trial, Captain Franks testified for the State (R. 8, T. 172).

Toohey. He testified, according to petitioner (R. 5), that Perelman, wounded by a bullet, had died. The official record shows no such witness. Whether there was or was not such a witness is of some importance in connection with the facts alleged on the perjury branch of the case. We give those facts below in appropriate order.

We note here that apart from just such a witness there was no evidence at all at the preliminary hearing that anyone had died.

The magistrate found "reasonable evidence" to bind petitioner over to the District Court on a charge of first degree murder. Petitioner was then returned to Leavenworth, Kansas, in the evening of the day of his arrival in Omaha, Nebraska (R. 3).

Six days later on February 17th, an information consisting of two counts in first degree murder was filed against petitioner in the District Court (R. 16).[4] The record shows no service of the information upon petitioner at any time (R. 16-18).

On March 15, 1936, petitioner, still at the Leavenworth Penitentiary and still uninformed of the filing of an information against him, was again brought by federal officers to Omaha "at about 4:15 PM" and placed in solitary confinement in an isolated cell of the County Jail. He was held incommunicado. The county public defender and his assistant called upon him after eleven that night. Their conversation lasted fifteen minutes. It consisted of persua-

[4] We follow the official record on this. Petitioner alleges specifically that after the order of bind over he was at 4 PM of the day of his preliminary hearing (which began at 2 PM) arraigned "in the Trial Court" to an information for first degree murder. He entered a plea of not guilty. That was on February 11th. The record shows that the information was not filed until February 17th. The petitioner, who has no clear idea of just what an arraignment is (cf. fn. 2, p. 6, *supra*), is apparently confused on this point. We follow the record and do not charge that Nebraska forced petitioner to plead to an information a few moments after preliminary hearing.

sion from the public defender to plead guilty to murdering Perelman, and the persistent refusal of petitioner to do so because, as he says, he "had exhonerated himself at the Preliminary beraing" (sic). At the end of fifteen minutes, the public defender and assistant public defender left with the statement that they "would have nothing to do with Petitioner's trial scheduled for trial the following morning" (R. 3-4).[5]

The following morning at nine, petitioner, a pauper and ignorant layman, stood trial for his life (R. 4; 18; 29; 30; 34). Brought into court in the custody of two federal officers, he appeared without counsel (R. 4; 19; T. 5). The information was read to him. The Trial Court asked for his plea. He pleaded "Not Guilty"; and forthwith moved orally for a continuance of at least twenty-four hours for the purpose of consulting counsel, examining the charge then communicated to him for the first time, summoning witnesses, and preparing a defense (R. 4). The motion was immediately denied by the Trial Court "upon full consideration" (R. 18; 4).

The Clerk began to impanel the trial jury. Petitioner alleges that after two or three jurymen had been called the public defender and his assistant entered the case in his behalf without having had any consultation with him (R. 4). The record shows their appearance as having occurred after the selection and swearing in of a complete jury (T. 5).

The trial continued at once (R. 4; 19; T. 5-6). The State called eighteen witnesses (R. 5-8; T. 1). All of the State's witnesses who were at the scene or in the vicinity of the crime at the very time of the crime or within a few moments

[5] Petitioner specifically alleges that these events occurred on the night before his trial. He dates that night as March 16th, but is continuously one day off in his chronology for the trial began March 16 (R. 18-19), and the night before the trial when the public defender called on him was March 15th.

thereafter, denied seeing petitioner or failed to testify on the point. (R. 5; T. 20; T. 31; 32-37; 37-42; 45; 50; 57; 63; 68; 70). The total of such witnesses for the State was ten.

The State through De Santi, the tavern keeper, Taylor, the man who admittedly shot Perelman, and Nowicki, his accomplice, introduced evidence, which, if believed, tended to prove that De Santi had lent or sold a gun to Nowicki; Nowicki had given it to Taylor; and Taylor had it at the time of the crime. (R. 6; 7-8; T. 76; 138; 112). A Dr. McCleneghan testified for the State that he had removed a bullet from Perelman, personally marked "S" by him, which in his opinion caused Perelman's death (R. 5-6; T. 23). McDonald, a ballistics expert, testified that the bullet, marked "S" by Dr. McCleneghan, came from the De Santi-Nowicki-Taylor gun (R. 6; T. 106). An incidental witness, Bruning, was used by the State to introduce a plat of the scene of the crime (R. 5; T. 8).

Thus far, there was no evidence implicating petitioner. De Santi, departing from his testimony at the preliminary hearing, testified that at various times he had seen Taylor, Nowicki, and petitioner at his tavern before the crime; but that he had not seen them talking together; and that finally he did not recall seeing petitioner at his tavern after the crime although he did see Taylor and Nowicki (R. 6; T. 72-85). Over defense objection, the State impeached De Santi by showing his testimony at the preliminary hearing to the effect that he had seen the three men before and after the crime (R. 6; T. 85 ff.).

Taylor, called again by the State, persisted in the testimony he had given at the preliminary hearing. Again, he testified that Hawk was not involved (R. 7-8; T. 136; 141; 142; 146; 148; 150). Without defense objection, the State was permitted to impeach Taylor, who was no surprise, by showing prior extrajudicial contradictory statements made

to police officers. The impeachment process was lengthy and added the testimony of two police officers (R. 7-8; T. 152-161; 169-171; 172-179). The jury's consideration of the impeachment evidence was in no way limited.

Thus far, there was no *competent* evidence implicating Hawk. Finally, Nowicki, the accomplice, alone implicated Hawk (R. 7; T. 107-133). There were no other witnesses to corroborate his story.

The State rested (R. 8; T. 179).

There was no motion for a directed verdict of acquittal (R. 19; T. 180).

The information showed petitioner, Henry Hawk, as using two aliases, "Henry Hawks" and "Charles Henry" (R. 16). The defense called one witness. A federal deputy marshal, he gave evidence directed to showing that petitioner did not use aliases (R. 8; T. 180-182).

The defense rested (R. 9; T. 182).

The trial court charged the jury (R. 20-25). There was no instruction on the lesser degrees of homicide. There was no instruction guiding the use by the jury of the evidence of Nowicki, the accomplice. There was no instruction withdrawing from the substantive consideration of the jury the extrajudicial statements of De Santi and Taylor. No such instructions were requested in behalf of the defense. The trial court volunteered none.

Everything went to the jury on the question of innocence or guilt—the evidence given at the trial and the statements allegedly made out of court by De Santi, and particularly, Taylor. (R. 20-25; R. 6; T. 85 ff.; R. 7-8; T. 152-161; 169-171; 172-179).

On March 18th—some evidence was heard; argument to the jury was had; the jury was instructed; the jury retired; the jury returned with a verdict of guilty; and the defense filed a motion for a new trial. (R. 25-27). The motion for a

new trial—it covers a full half-page of the printed record (R. 27)—stated broadly, simply, and only the following:

"Motion for New Trial

"Comes now the defendant and moves the Court to grant a new trial in the above entitled case for the following reasons:

"1. Errors of law occur-ing at the trial.

"2. Errors of facts occur-ing at the trial.

"3. Newly discovered evidence which the defendant exercising ordinary diligence was unable to produce at the trial.

"4. That the judgment is contrary to the evidence.

"5. Irregularity on the part of the witnesses for the State.

"6. Irregularity on the part of the County Attorneys for the State.

"Henry Hawks, By Joseph Lovely, His Attorney, John N. Baldwin."

On March 19th—the motion for a new trial was overruled, the court "being fully advised in the premises" (R. 28); petitioner was sentenced to life imprisonment (R. 28); petitioner was returned to Leavenworth, Kansas, to complete his federal sentence first (R. 10; 28).

The difference between the night petitioner arrived in Omaha to stand trial and the day he was returned to Leavenworth was only four days, plus the loss of liberty for life (R. 3; 18; 28).

Throughout the period from jury selection to conviction petitioner was represented by the county public defender and his assistant. Their names were Joseph Lovely and John N. Baldwin. There was scant time for consultation. And petitioner apparently alleges that at no time did such counsel consult with him "regarding his defense" (R. 4).

But thereafter such counsel as he had deserted petitioner. Proceeding without counsel, petitioner filed a timely

notice of appeal in the trial court. He alleged but two grounds for reversal: (1) that the jury "was bias—and prejudiced" (sic); and (2) that the court erred in the admission of "certain evidence" as "appears by the transcript". Leave to proceed as a pauper was requested and granted. The trial court ordered its clerk and court reporter to prepare and deliver to petitioner a Transcript of Proceedings and a Bill of Exceptions so that he might prosecute his appeal. "But for some reason best known to the Trial Court and Prosecuting Officials the appeal documents were impounded and consealed (sic) and never delivered to your Petitioner." Time for appeal expired as petitions to the Supreme Court of Nebraska for an extension of time and for mandamus upon the trial court to compel production of the appeal documents failed. Some nine months later advice was received from the court reporter that the County Attorney (prosecuting official at the trial) had the bill of exceptions "in his file" (R. 10-11; 30-31).

Following his conviction for murder, petitioner was transferred from the federal penitentiary at Leavenworth to the federal penitentiary at Alcatraz Island, California (R. 10). There, on November 27, 1937, while in the act of leaving Alcatraz "on Parole to officials of Nebraska", petitioner was seized by Nebraska officials, placed in irons, and transported by such officials to the state penitentiary in Lancaster County, Nebraska, without authority of law and against petitioner's will and consent. There petitioner has remained ever since pursuant to the Nebraska sentence of life imprisonment (R. 12).

Petitioner protests his innocence (R. 12). He states that innocence would have been proven, had time been granted for the proof (R. 12). He alleges specifically that Taylor before the trial "was threatened and told by the prosecuting officials he would never live to get out of the penitentiary, if he didn't take the stand and swear that Henry Hawk shot

Isadore Perelman during the attempted robbery" (R. 8). In his ignorance, petitioner fails to understand the process of impeachment and hence charges intimidation of Taylor while on the stand; but it will be recalled that the sworn statement of Taylor implicating petitioner which was made to the prosecuting officials outside of court did go to the jury on the question of petitioner's innocence; and petitioner, reasonably interpreted, fairly charges that in that statement Taylor, under intimidation, was a perjurer (R. 7-8). The perjury of Nowicki, who did testify in court against petitioner, is flatly charged (R. 7). Petitioner appears to allege (R. 7) that Nowicki's bribed perjury will be proven, if he is granted a hearing, by the "subpoeaning" of witnesses and evidence in the care and custody of Frank Marsh, Secretary of State of Nebraska. In one particular, petitioner offers the Clerk of the federal district court as a prospective witness to disprove Nowicki's claim of acquaintance with petitioner for the period Nowicki claimed (R. 9). In further detail, petitioner claims the prosecution knew the testimony of Dr. McCleneghan, the coroner's county physician, was perjured (R. 5). McCleneghan testified as an essential part of the proof of *corpus delicti* at the trial that after the death of Perelman he removed a bullet from the body of Perelman lying at the morgue; personally marked that bullet with the letter "S"; and that the same bullet marked "S" which he identified on the stand caused the death of Perelman. Petitioner charges that the bullet marked "S" was removed by a Dr. C. J. Toohey, hospital physician, before the death of Perelman, and that Dr. Toohey so testified at the preliminary hearing, although the transcript of that hearing fails to include his testimony. (R. 5; T. 21-24; P. H. "Index"). Broadly, petitioner alleges "that your petitioner's Trial and Conviction was (sic) obtained by the use of perjured testimony knowingly used by the Prosecuting Officials" (R. 15). This allegation, he

states, "is supported by the evidence of fact as more fully appears upon the record to be presented on day of hearing and by testimony of witnesses to be given at the hearing" (R. 15).

Finally, petitioner "has by petition continually complained to this Court and every court in the land as to the illegal manner in which he has been convicted, kidnaped (sic) and committed to the Nebraska State Penitentiary" (R. 12). The half-forgotten details of that effort, so far as they can be gleaned and collated from various judicial records and reports, are recounted here. For that nine year effort, futile thus far in obtaining the opportunity to be heard on facts alleged, is the matrix in which this proceeding is now imbedded.

Apparently as early as 1938, at least two petitions for *habeas corpus* had been filed with and denied by the Supreme Court of Nebraska. See p. 7 of Respondent's Brief in Opposition in *Hawk* v. *Olson*, 130 F. (2) 910, cert. den. 317 U. S. 697. Henry Hawk filed his third petition in the District Court of Lancaster County. He raised only the question whether his Nebraska sentence violated Nebraska law in postponing punishment thereunder to await completion of a federal sentence. Denial of that petition without hearing was affirmed by the Supreme Court of Nebraska. *Hawk* v. *O'Grady*, 137 Neb. 639. Presumably because no federal question was presented, this Court denied certiorari. 311 U. S. 645. (R. 38; and see *Ex Parte Hawk*, 321 U. S. 114, 115). A fourth petition filed in the District Court of Lancaster County was dismissed without hearing. R. 38-39; and see *Hawk* v. *Olson*, 130 F. (2d) 910 at p. 910.

Henry Hawk, still acting *pro se*, filed his fifth petition in the federal district court "alleging matters not previously brought to the attention of the State Courts". See *Ex Parte Hawk*, 321 U. S. 114, 115. Dismissal of the

petition without hearing was affirmed on the ground of failure to exhaust state remedies. *Hawk* v. *Olson*, 130 F. (2d) 910 (C. C. A. 8th, 1942). This court denied certiorari. 317 U. S. 697.

Petitioner returned to the state courts. An original application for *habeas corpus*, in substance the same as his application here, was denied by the Supreme Court of Nebraska without opinion. See *Ex Parte Hawk*, 321 U. S. 114, 115.

Petitioner tried another opening that seemed to appear in the shifting fog before him. Henry Hawk, still with no one but himself for counsel, presented his present contentions in an original petition to this Court. Leave to file was denied "but without prejudice to presentation of the matters alleged to the U. S. District Court". See *Ex Parte Hawk*, 321 U. S. 114, 115; *Ex Parte Henry Hawk*, 318 U. S. 746.

Accordingly, petition to the federal district court was renewed, and a like petition was filed with the Senior Circuit Judge of the Eighth Circuit. Both petitions were denied. Leave to appeal to the Circuit Court of Appeals for the Eighth Circuit was denied by the Senior Circuit Judge. See *Ex Parte Hawk*, 321 U. S. 114, 115.

So Henry Hawk, *pro se*, returned to this Court. In his second original application, he asked leave to file a petition for *habeas corpus*, identical in substance to the petition presented in this proceeding. The Court stated in paraphrase of petitioner's allegations that "the state court forced him into trial for a capital offense • • • with such expedition as to deprive him of the effective assistance of counsel, guaranteed by the due process clause of the Fourteenth Amendment." In support of the granting of a hearing on those allegations, the Court cited *Powell* v. *Alabama*, 287 U. S. 45; *Smith* v. *O'Grady*, 312 U. S. 329; and (on a cf. citation) *Betts* v. *Brady*, 316

U. S. 455. So too, the Court stated petitioner's allegation that "his conviction was based in part on the introduction at the trial of evidence known by the prosecution to be perjured"; and again the Court cited, in support of a hearing on those allegations, too, the case of *Mooney*, 294 U. S. 103. Finally, this Court concluded:

> "From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, *Walker* v. *Johnston*, 312 U. S. 275, 284-7; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101, 104-5; *Cochran* v. *Kansas*, 316 U. S. 255, 258."

Finding that state remedies had not been exhausted and that therefore petitioner was "not at this time entitled to relief in a federal court", the Court denied the motion for leave to file without prejudice to the procedure indicated in its opinion. See *Ex Parte Hawk*, 321 U. S. 114, 115-116, 118.

Accordingly, petitioner, pursuant to the procedure so indicated, filed his present application—it was his eleventh (approximately)—in the District Court of Lancaster County, and requested the hearing he had yet to obtain (R. 15). This is what happened:

II. The Proceedings Upon the Application for Habeas Corpus

The application was dismissed without return and without hearing "for want of merit and for failure to state a cause of action" (R. 37-38). The District Court of Lancaster County noted that it had "fully and carefully examined" the application, and further that it had made "an examination" of its own records (R. 38). The petition—it is only fifteen pages long—makes four different references to the supporting opinion of this Court in *Ex*

Parte Hawk, 321 U. S. 114 (R. 1; 10; 14; 15; 15; and see, too, R. 34). The District Court of Lancaster County fails to note it (see its opinion, R. 37-40). That court did note however that dismissal of an earlier petition filed in the same court by petitioner was affirmed by the Supreme Court of Nebraska, 137 Neb. 639, with certiorari denied by this Court, 311 U. S. 645 (R. 38). It found that the issues presented in the present application were on that earlier petition "heretofore fully and finally adjudicated" (R. 38). The earlier petition raised and was disposed of solely on the question of the validity under Nebraska law of the postponement of punishment under petitioner's Nebraska sentence. (See p. 14, *supra*.)

On appeal, the Supreme Court of Nebraska could find no error in the District Court's disposition of the application, and affirmed the judgment below (R. 51). It passed upon the merits of petitioner's allegations concerning deprivation of the effective assistance of counsel, and found "there is no merit to petitioner's contention" (R. 51). Like the opinion of the District Court, the opinion of the Supreme Court makes no mention of the Court's opinion in *Ex Parte Hawk*, 321 U. S. 114. It passed upon the merits of petitioner's allegations as to perjury, and likewise found no merit in them. In addition, the court stated that the writ of error *coram nobis* would be the proper remedy for a meritorious case concerning perjury (R. 49). Petitioner's allegations concerning the deprivation of an appeal were passed upon on the merits (R. 50). Here the court gave a rationale:

> "* * * Petitioner says these [the appeal documents] were impounded and concealed and never delivered to him, but he fails to state in what manner they were impounded and concealed. The bill of exceptions was subsequently found in the office files of the county attorney of Douglas county. No petition

> in error was ever filed in the supreme court. He alleges he was deserted by his counsel. However, the petitioner fails to show that he ever requested the public defender or his assistant to appeal. * * *"

Without discussion, the court passed upon and rejected petitioner's contentions based on his allegations of denial of equal protection in being brought to Nebraska and imprisoned in violation of Nebraska law.

Petitioner requested a writ of certiorari. Respondent stated in opposition that "no federal question is involved", and concluded (Brief "In Resistance", p. 27):

> "It is apparent that this petition is another of the numerous, meritless applications made by the petitioner for the sole purpose of harassing the courts and law enforcement officials. To sustain petitioner will be making the writ of habeas corpus an instrument of oppression instead of an instrument of liberty. The application for a writ of certiorari should be denied."

The Court granted certiorari (R. 52).

Specification of Errors to Be Urged

We urge that the court below erred in failing:

1. To hold that petitioner was entitled to be heard in proof of his allegations that he was forced into trial for a capital offense with such expedition as to deprive him of the effective assistance of counsel in violation of the Fourteenth Amendment.

2. To hold that petitioner was entitled to be heard in proof of his allegations that his conviction was obtained by perjured testimony knowingly used by the prosecution in violation of the Fourteenth Amendment.

3. To hold that petitioner was entitled to be heard in proof of his allegations that he was deprived of an appeal

from his conviction in violation of the "equal protection" clause of the Fourteenth Amendment.

4. To hold that petitioner was entitled to be heard in proof of his allegations that he was illegally and forcibly brought into Nebraska and imprisoned in violation of the "equal protection" clause of the Fourteenth Amendment.

5. To reverse the judgment of the District Court of Lancaster County dismissing the petition for *habeas corpus*.

Summary of Argument

A. DUE PROCESS

I. *Deprivation of the Effective Assistance of Counsel.*—An ignorant pauper on trial for his life in a complicated proceeding faced arraignment alone. Public counsel began to defend him after commencement of the trial. Conviction for life was the result—five days after he was brought into the jurisdiction. Such are the facts disclosed by the official record of the proceedings that convicted your petitioner. On those facts, there is no question of the right of petitioner to an effective appointment of counsel. On those facts, in our view, there is no substantial question that petitioner was deprived of that right; for counsel had no time to investigate the facts in petitioner's behalf; no opportunity to protect petitioner's pre-trial rights; and no breathing space to prepare on legal questions of crucial importance in the trial. In reason, there was in these circumstances no opportunity for petitioner to be heard in his defense. And the precedents so hold. *Powell* v. *Alabama*, 287 U. S. 45, among the several controlling precedents, was basically this case. Hence, as the Court has indicated in *Ex Parte Hawk*, 321 U. S. 114, petitioner is entitled to be heard in proof of his contention that he was hurried to conviction with such expedition as to deprive him of the effective assistance of counsel.

II. *Perjury.*—Petitioner alleges that his conviction was obtained by perjured evidence knowingly used by the prosecution. In addition, he alleges the supporting details of that complaint. So much, certainly, suffices to entitle him to be heard in proof. Indeed, less would do. *Pyle* v. *Kansas*, 317 U. S. 213; *Williams* v. *Kaiser*, 323 U. S. 471; *Tompkins* v. *Missouri*, 323 U. S. 485; *Walker* v. *Johnston*, 312 U. S. 275. Hence, the Court should persist in the view, indicated in *Ex Parte Hawk*, 321 U. S. 114, which grants to petitioner the opportunity to be heard in proof of his contention that perjury procured by the prosecution sent him to the penitentiary for life.

B. EQUAL PROTECTION

I. *Deprivation of Appeal Rights.*—Agents of the State of Nebraska impounded and concealed petitioner's appeal documents thus depriving him of the right, generally accorded to all in Nebraska, to appeal from a conviction. So petitioner alleges. If it be true, violation of the Fourteenth Amendment by invidious denial of an appeal is plain. Hence, petitioner must be heard in proof, *Cochran* v. *Kansas*, 316 U. S. 255, and other authorities cited.

II. *Discriminatory Treatment of Petitioner in Bringing Him into Nebraska and Keeping Him Imprisoned without regard to the General Law of Nebraska.*—As is its right, Nebraska has adopted its own rule governing treatment of the prosecution or imprisonment of a man brought into the state without extradition process. The Nebraska rule grants release to one, otherwise lawfully imprisoned, who is brought into the state without extradition process. That rule of general applicability was ignored in the particular case of petitioner who alleges that he was brought into Nebraska without extradition and nevertheless kept continuously imprisoned. Such invidious treatment, if it

occurred, was, on the authorities, a denial of equal protection. Hence, petitioner is entitled to be heard in proof of his *prima facie* case of denial of equal protection.

We submit for all of the foregoing reasons that the judgment of the Court below should be reversed and the case remanded for hearing on all four of the foregoing contentions.

Argument

We make two contentions as to due process, and two as to equal protection. First we contend under the due process clause that petitioner is entitled to a hearing upon (1) his allegations of deprivation of the effective assistance of counsel in a capital case; and (2) his allegations that perjured testimony knowingly used by the prosecution obtained his conviction. Second as to equal protection we contend that petitioner is entitled to be heard upon (1) his allegations that he was deprived of an appeal from a conviction of first degree murder; and (2) his allegations that he was illegally and forcibly brought into Nebraska and incarcerated without regard to Nebraska law applicable to others similarly situated.

A. PETITIONER IS ENTITLED TO A HEARING UPON HIS ALLEGATIONS THAT IN HIS TRIAL AND CONVICTION HE WAS NOT ACCORDED DUE PROCESS.

The Court has already indicated, if not held, that petitioners allegations entitle him to a hearing upon both of his due process contentions, first that "the state court forced him into trial for a capital offense * * * with such expedition as to deprive him of the effective assistance of counsel, guaranteed by the due process clause," and second, that "his conviction was based in part on the introduction at the trial of evidence known by the prosecution to be perjured." See *Ex Parte Hawk*, 321 U. S. 114,

115-116. We have quoted from the Court's opinion in *Ex Parte Hawk* which thus summarizes the allegations of an original petition for *habeas corpus* filed by petitioner which was in substance the same as the petition here. The *per curiam* opinion in *Ex Parte Hawk* cites decisions of the Court supporting petitioner's right to be heard and concludes:

> "From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, *Walker* v. *Johnston*, 312 U. S. 275, 284-7; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Waley* v. *Johnston*, 316 U. S. 101, 104-5; *Cochran* v. *Kansas*, 316 U. S. 255, 258." [6]

Ex Parte Hawk has since been cited by the Court as a holding in relation to the point of deprivation of the effective assistance of counsel. See *House* v. *Mayo*, 324 U. S. 42, 45; *White* v. *Ragen*, 324 U. S. 760, ; 65 Sup. Ct. 978, 980.

Whether *Ex Parte Hawk* be dictum or holding, paramount here is the fact that public conscience and settled law compel persistence in the view there expressed.

I. *Petitioner is Entitled to be Heard upon his Allegations that he was forced into Trial for a Capital Offense with such Expedition as to Deprive him of the Effective Assistance of Counsel.*

Petitioner, a pauper and ignorant layman, was conveyed one day from the federal penitentiary at Leavenworth, Kansas, to Omaha, Nebraska. There, on that day, he was the defendant in a preliminary hearing before a local magistrate upon a charge of murder in the first degree (R. 2; P. H. 1). The hearing, according to the official record,

[6] The negative cast of this language is probably due to the fact that the Court was denying leave to file an original petition and at the same time suggesting its filing in a state court whose action was not then under review.

developed no evidence that anyone had died (pp. 6-7, *supra*); but petitioner was, nevertheless, bound over for prosecution on a murder charge (P. H. 50). On that day, he was returned to Leavenworth (R. 3). He was in custody at all times. He had no counsel and was forced to represent himself throughout the preliminary hearing (R. 2). We pass over the nice question whether those facts alone comprised a substantial denial of due process. See *Wood* v. *United States*, 128 F. (2d) 265 (App. D. C.); and *cf. Barber* v. *United States*, 142 F. (2d) 805 (C. C. A. 4th), cert. den. 322 U. S. 741.

By ancient statute and settled judicial decisions in Nebraska, it is the right of a defendant in a felony case to have one day between service of an information upon him and arraignment upon the information served. The right is held to be a substantial one enabling the defendant to ascertain the precise nature of the information against him before pleading thereto. *Zink* v. *State*, 34 Neb. 37; *Foster* v. *State*, 83 Neb. 264; *Hoctor* v. *State*, 141 Neb. 329. The right is generally accorded to all, and exceptional violations of the right result in reversals of convictions. *Zink* v. *State, supra; Hoctor* v. *State, supra*, at p. 333. It was not accorded to Henry Hawk. Without counsel and without one day for counsel to prepare, he was forced upon immediate arraignment to plead to the merits of an information, served on no one and read to him then for the first time (R. 4; 16-18). Petitioner's plea of not guilty did not obviate prejudice to him; it prejudiced his defense. The plea to the merits waived all matters proper for pleas in abatement and to quash. *Hunt* v. *State*, 143 Neb. 871; *Lindley* v. *State*, 117 Neb. 597. Such matters waived included the loss of valuable rights to question whether there was a fatal lack of evidence of murder at the preliminary hearing (see *Jahnke* v. *State*, 68 Neb. 154; 181; *Murray* v. *State*, 119 Neb. 16); to track down variances between complaint

and information necessitating quashing of the information (see *Whither* v. *State*, 46 Neb. 144); and to attack defects in the information (see *Hunt* v. *State, supra*). Pertinent decisions of this Court point strongly to a denial of equal protection here, if not of due process. See Part B, *infra*, pp. 46 to 51; and *cf. Crain* v. *United States*, 162 U. S. 265; *Garland* v. *Washington*, 232 U. S. 642. But this we pass over.

Public counsel for the defense in petitioner's trial for murder "had no consultation whatsoever" with petitioner regarding his defense (R. 4). This, it seems, was rather plainly a denial of due process. Such is the trend of a line of majority decisions of the Court. *Powell* v. *Alabama*, 287 U. S. 45, 49, 56, 59, 73; *Tompkins* v. *Missouri*, 323 U. S. 485, 488; *House* v. *Mayo*, 324 U. S. 42, 45; *The People ex rel. Burgess* agt. *Risley*, 66 How. Pr. (N. Y.) 67; *Louie Yung* v. *Colman*, 5 F. Supp. 702 (S. D. Idaho). And this, too, we pass over.[7]

We are content to adopt the most restrictive of the various approaches to the problem here which are indicated in opinions of the Court. We restrict the inquiry to "an appraisal of the totality of facts" surrounding the question of counsel in petitioner's trial. See *Betts*

[7] We put aside the fact that public counsel deserted petitioner upon his appeal from a sentence of life imprisonment (R. 10). Petitioner had to proceed alone, and lost his appeal rights (R. 19). The underlying concept of fairness which has guided application of the due process clause with ever-increasing emphasis upon common decency in an advancing civilization has yet to be firmly applied to the area of rights to counsel in criminal appeals. But see *Reid* v. *Aderhold*, 65 F. (2d) 110 (C. C. A. 5th), cert. den. 290 U. S. 676, which finds in 1933 no rights to counsel on appeal; and *Reid* v. *Sanford*, 42 F. Supp. 300 (N. D. Ga.) which finds in 1941 rights to counsel on appeal equivalent to those at trial. Tangential lines of reasoning in other opinions appear (but darkly) to lean in the direction of recognizing here what common decency, in our view, requires. See *Williams* v. *Kaiser*, 323 U. S. 471, 477, *Gilmore* v. *United States*, 129 F. (2d) 199, 203 (C. C. A. 10th), cert. den. 317 U. S. 631.

v. *Brady*, 316 U. S. 455, 462; *Ashcraft* v. *State of Tennessee*, 322 U. S. 143, 158 (dissenting opinion complaining of abolition of "the totality of facts" rule in a field cognate to the present question). So proceeding, we believe decision in petitioner's favor still to be so plainly required by the facts that it is unnecessary to decide the four points we have pretermitted.

Henry Hawk was brought to Omaha the day before his arraignment and trial for a capital offense (R. 3-4). He was without counsel, without funds and without learning.[8] The county public defender called upon petitioner the night before the trial, and began acting as his counsel at

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[8] His age and the locality of his home and friends do not appear. The record strongly indicates that petitioner's home was not in Omaha (R. 6; 9). On this point, which is of no substantial significance in the glare of the many highlights of this case, counsel tenders the information received by mail from petitioner that his home is St. Joseph, Missouri. The transcript of the conviction proceeding shows that petitioner was without counsel until after arraignment and the commencement of trial (R. 18; cf. R. 4). That he was indigent is certain; and as to this there is no issue. See Brief for Respondent (Appellee) filed in the court below, at p. 41, which brief is in the record here but not printed. Petitioner refers to himself as having been of the class of "poor, defens-less (sic) and ignorant litigants" (R. 34). Cf. *Tompkins* v. *Missouri*, 323 U. S. 485, 487. The public defender appeared for petitioner on the ground, required by statute, that petitioner "had not the ability to procure counsel". Comp. Stats. Neb. (1929) Sec. 29-1803. Shortly after his conviction, petitioner filed a poverty affidavit, and was permitted by the trial court to proceed upon his appeal *in forma pauperis* (R. 29-30). Finally as to his ignorance—it is deep-dyed and the record here shows its tincture on practically every page (see pp. 5 to 18, *supra*). Again, he refers to himself as one of a class of "ignorant litigants" (R. 34). There seems to be a sort of perverse pride in the man that keeps him from flatly stating that he is ignorant. In the nine years of his futile effort to get a judicial hearing which have followed upon his conviction, he has acquired an acquaintance with legal terms. The acquaintance has led to little fundamental understanding of the meaning of those terms. (Reread his petition for *habeas corpus*, and his petition for certiorari and brief in support thereof). Actually, petitioner informs counsel by mail that his education extends through two grades of elementary school in Maryville, Missouri, plus two years in the third grade without passing.

the trial the following morning at some time after arraignment and commencement of the trial (R. 4; 18).[9]

Gone was the opportunity for the time and facilities for investigation and the production of evidence that an accused must have.[10] Since public counsel were precipitated into the case, we cannot assume that there was no defense.[11] *Powell* v. *Alabama*, 287 U. S. 45, 58; *Commonwealth* v. *O'Keefe*, 298 Pa. 169. To the contrary, had there been time, there was much factual investigation, likely to be fruitful, for the public defender to do.

Ten witnesses for the State who were in the neighborhood of the crime failed to identify petitioner (p. 8, *supra*). Apparently, the neighborhood was a crowded, poor one. Some digging—there was a life at stake—might have found neighbors who saw only one man running from the shooting and joining but one other man in the getaway car (necessarily Taylor and Nowicki, thus excluding petitioner). At least one witness for the State who was specifically questioned on the point so testified. His name was Joseph Dargaczewski (T. 64-68). And it may be noted further that prospective witnesses for the State named John Wieczorek, James Farrascio and James John were not called. The names of prospective State witnesses

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[9] The county public defender is an elected official. His salary is $3600 per annum. His duties are: (1) to defend indigent persons in all felony cases; (2) to prosecute wage and other demands of impecunious persons believed to be meritorious, but not cases exceeding $100; and (3) to defend impecunious persons in all civil actions in which such persons are harassed unjustly. By specific statutory provision, the public defender, here, being in a county of over one hundred and sixty thousand inhabitants, has an assistant ($150 per month) and stenographer ($100 per month) to help him. Comp. Stats. Neb. (1929) Secs. 29-1803-4.

[10] "An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence." *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 279.

[11] That is, no defense other than the fact that Henry Hawk did not use the name "Henry Hawks" etc.

were endorsed on the information. They included one, Ben Barone, De Santi's partner, who was working beside De Santi, the tavern keeper, on the night of the shooting (R. 18; T. 109-110; P. H. 8). He, too, was not called. There was no time to interview the State's witnesses, assuming that there was time to find out who they were by reading the endorsement of names on the information. There was no time to ferret out witnesses for the defense.[12]

Gone was the opportunity for public counsel to explore valuable rights of the defense to pre-trial procedures. If counsel had had the time, study of the transcript of preliminary hearing would have shown the lack of evidence of any death. Before arraignment, a petition for *habeas corpus* would have tested the sufficiency of the evidence at the preliminary hearing to show that a murder was committed, and that the defendant probably committed it. *Jahnke* v. *State*, 68 Neb. 154, 161; 181; *State* v. *Robertson*, 55 Neb. 41, 45. A motion to quash or plea in abatement, just which is not clear, would have raised at least the question whether there was *some* evidence of murder at the preliminary hearing. *Jahnke* v. *State*, *supra*; *Murray* v. *State*, 119 Neb. 16; *Whitner* v. *State*, 46 Neb. 144. The information against Henry Hawk (R. 16-17) defies grammatical analysis. There was no one to scrutinize it, to search out its defects, to choose the vehicle of plea in abatement or motion to quash, and to urge the points found. Cf. *Ex Parte Eads*, 17 Neb. 145; *Smith* v. *State*, 21 Neb. 552, 556; *Dutiel* v. *State*, 135 Neb. 811; *Knothe* v. *State*, 115 Neb. 119. Henry Hawk, without counsel to assist him, pleaded to the merits of the information. These pre-trial

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[12] Taylor's testimony, for example, indicated three witnesses who could testify that petitioner was not with him when he committed the crime. Admittedly, it would have been difficult, and maybe it would have been impossible, to locate these witnesses (T. 147; 165). But the point is that with a man's life in the balance there was no time for the attempt.

rights were thus in large part waived *Hunt* v. *State*, 143 Neb. 871; *Lindley* v. *State*, 117 Neb. 597; *Havlicek* v. *State*, 101 Neb. 782.

Gone, too, was the opportunity for public counsel to prepare the law of the case. Cf. *Mitchell* v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th). There are three degrees of homicide in Nebraska—murder in the first degree punishable by death or life imprisonment; murder in the second degree punishable by not less than ten years of imprisonment; and manslaughter punishable by not more than ten nor less than one year of imprisonment. Comp. Stats. Neb. (1929) Secs. 28-401-403. Upon an information for murder in the first degree, conviction for manslaughter or murder in the second degree may be proper. *Boche* v. *State*, 84 Neb. 845; *Haddix* v. *State*, 76 Neb. 369; *Davis* v. *State*, 51 Neb. 301, 321. The governing rule is simply stated—if the permissible inferences warrant, lesser degrees go to the jury, otherwise not. *Davis* v. *State*, 116 Neb. 90; *Denison* v. *State*, 117 Neb. 601. But application of the rule to a particular case is difficult. Cf. *Kraus* v. *State*, 102 Neb. 690; *Bourne* v. *State*, 116 Neb. 141. Indeed, application of the rule is judicially recognized to be so difficult that "when a defendant pleads guilty to an information charging murder in the first degree, he is not required, nor even allowed, himself, to determine the degree of the crime, since under such an information he might be convicted of murder of either degree or of manslaughter." *In Re Application of Cole*, 103 Neb. 802, 805. In this case particularly, it would have been difficult on the face of the complicated statutory definitions to work out lesser degrees of homicide. Henry Hawk was not qualified for the undertaking. And, apparently public counsel who had the qualifications, had not the time. Observe that Taylor, who did the shooting, is serving for the same crime a conviction for *second degree* murder (T. 161). The

point is not unimportant. Cf. *Tompkins* v. *Missouri*, 323 U. S. 485, 488; *Williams* v. *Kaiser*, 323 U. S. 471, 474.

Preparation on the law relating to the use of impeachment testimony and the testimony of an accomplice was vital. The pertinence of such questions could have been forecast from a study of the preliminary hearing. Yet again there was no time.

Public counsel off to a precarious start never got a chance to recover balance. The proceedings pressed on relentlessly from arraignment to sentencing in four consecutive days of hearings.

Public counsel did object to the impeachment of De Santi. His objection was overruled, and probably correctly so for De Santi may have been a surprise to the State. De Santi had departed from his rather unimportant testimony at the preliminary hearing (R. 6; T. 85 ff.). See *Cornell* v. *State*, 138 Neb. 708, reh. 139 Neb. 878. But Taylor, whose statements had great significance, did not depart from his testimony at the preliminary hearing. At preliminary hearing and at trial, called both times by the State, he flatly denied that Henry Hawk was in on the crime. He was no surprise to the State.[13] In the absence of surprise, the State was not entitled to impeach him. *Cornell* v. *State*, *supra*. The State did impeach him with

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[13] Respondent says:

"• • • Taylor • • • at the preliminary hearing, testified that petitioner was an accomplice in the perpetration of the crime, but changed his story at the time of the trial after he himself had pled guilty to being an accomplice and was serving his sentence in the Nebraska State Penitentiary." (Respondent's "Brief in Resistance" pp. 15-16.)

In fact, there can be no question that Taylor told the same story, exonerating Hawk, at both preliminary hearing and trial; and, further, it appears that Taylor had pled guilty and was serving time prior to both preliminary hearing and trial (P. H. 24; and transcript references in the text). We do not charge intentional deception in these errors. But we do believe that they are symptomatic of something else. See p. 53, *infra*.

contradictory statements made to the police which did implicate Henry Hawk. And to this, public counsel made no objection.[14] (R. 7-8; P.H. 24-47; T. 136 ff.; 152 ff.) Nor did he, in his helpless state, request or get a caution to the jury that statements made out of court by Taylor were not evidence of petitioner's guilt or innocence. To that the defense was entitled. *Koch* v. *State*, 130 Neb. 119; *Cornell* v. *State, supra.*

Nowicki's was the only testimony given at the trial which implicated petitioner. Nowicki was an accomplice. His testimony so set raised a host of involved questions for close study of facts and law. If his evidence was uncorroborated, and if he swore falsely in regard to a material matter, or in the alternative perhaps, if his testimony was unreliable because of inherent incredibility or hope of lessened punishment, then defendant might have been entitled to a directed verdict of acquittal. *Jahnke* v. *State*, 68 Neb. 154; 181; *Ruzicka* v. *State*, 137 Neb. 473; *Millslagle* v. *State*, 137 Neb. 664, 138 id. 778. Nowicki's testimony was uncorroborated in any substantial sense. It was flatly contradicted by Taylor, the only other witness who did testify on the question of petitioner's collaboration, if any. Admittedly, though, the precise coverage of the word "corroboration" in Nebraska criminal law is difficult to ascertain. Cf. *Dyson* v. *State*, 107 Neb. 774; *Cockeram* v. *State*, 121 Neb. 757; *Barnes* v. *State*, 124 Neb. 826; *Lovejoy* v. *State*, 130 Neb. 154. There was an innocent nonchalance about Nowicki's testimony that might have been considered inherently incredible. According to himself, he goes out and buys a gun as a courtesy—nothing more—for two felons

[14] Had the State been surprised, it might still have been a question within the trial court's discretion whether to permit use for impeachment purposes of the highly prejudicial prior statements attributed to Taylor. *Cornell* v. *State, supra, semble.* Public counsel, with no time for preparation, would have been in no position to seek out the answer.

to use in an undisclosed "play". He agrees to drive the car and still does not know the project. He does not know whose car it is. (T. 110-111; 129). He was almost certainly lying. Taylor had stated it was Nowicki's car, and on that point Taylor had no reason to falsify. (T. 155). In the hope of lessening his own punishment, Nowicki had every reason to minimize his own participation and draw in Henry Hawk to aid the prosecution. It may be that petitioner was entitled to a directed verdict of acquittal. But study means time. Public counsel could not cope with these questions. No directed verdict of acquittal was requested.

The case went to the jury. If the defense had had the effective assistance of counsel, the case before the jury on petitioner's culpability would have consisted at worst of the word of an impeached felon, Taylor, that Hawk did not participate, against the word of another impeached felon, Nowicki, that Hawk did. For a jury to find guilt beyond a reasonable doubt on that choice would have been difficult. But that is not the case that went to the jury. Public counsel failed to request an instruction limiting impeaching evidence to impeachment. The defense had a right to it. *Cornell* v. *State*, *supra*. With that right lost in the shuffle, the case before the jury became the word of Nowicki which seemed to check, so far as Hawk's participation was concerned, with the statement of Taylor made out of court.[15]

If not entitled to a directed verdict, the defense was entitled to an instruction guiding the jury's consideration of Nowicki's testimony. Had he had the time to search it out, public counsel would have learned that the decisions of the Supreme Court of Nebraska give an accused the right to an instruction noting the weakness of an accomplice's testimony and advising treatment of such testi-

[15] "Left without the aid of counsel he may be . . . convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible". *Powell* v. *Alabama*, 287 U. S. 45, 69.

mony "with great care and caution". *Goemann* v. *State*, 94 Neb. 582; *Dyson* v. *State*, 107 Neb. 774; *Neiden* v. *State*, 120 Neb. 619; and see *Millslagle* v. *State*, *supra*; *Holmgren* v. *United States*, 217 U. S. 509.

These matters are the very weft of a criminal case, at least, where as here, the case for the State was weak. Cf. *Glasser* v. *United States*, 315 U. S. 60, 67. The trial court had no clear duty *sua sponte* to charge on impeachment and accomplices.[16] No such instructions being requested, he gave none (R. 20).

On the day the jury returned its verdict of guilty, the defense filed its motion for a new trial (R. 27). Understandably, defense counsel was still reeling. The motion set forth, practically *in haec verba*, most of the grounds for a new trial as set forth in the statutes. Comp. Stats. Neb. (1929) Sec. 29-2101. A half-page long (Cf. *Luster* v. *State*, 142 Neb. 253), it failed to submit the affidavits required by statute. Id. Sec. 29-2102. The next day the motion was denied and petitioner was sentenced to life imprisonment four days after being brought into the state (R. 27). He proceeded to appeal without counsel.

That is the "totality of facts".

There can be no question of petitioner's right under the Fourteenth Amendment to an effective appointment of counsel, either by way of operation of the public defender statutes or by appointment of the trial court. *Powell* v. *Alabama*, 287 U. S. 45; *Smith* v. *O'Grady*, 312 U. S. 329; *Holiday* v. *Johnston*, 313 U. S. 342; *Tompkins* v. *Missouri*, 323 U. S. 485; *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson*, 324 U. S. 786; 65 Sup. Ct. 989; *White* v. *Ragen*, 324 U. S. 760; 65 Sup. Ct. 978; *Mitchell* v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th); see *Adams* v. *U. S. ex rel. McCann*, 317 U. S.

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[16] Cf. *Neiden* v. *State*, 120 Neb. 619; and *Lovejoy* v. *State*, 130 Neb. 154 with *Cornell* v. *State*, 138 Neb. 708; 139 id. 878; *Koch* v. *State*, 130 Neb. 119; and *Marshall* v. *State*, 116 Neb. 45.

269. Nor do we understand that that there is any attempt to raise such an issue.

The question here is simply whether petitioner was hurried to conviction with such expedition that there was no effective appointment of counsel. The answer is, in our view, simply, "Yes! he was."

We deal here with the very core of due process—the opportunity to be heard. *Powell* v. *Alabama*, 287 U. S. 45, 68 ff.; *Palko* v. *Connecticut*, 302 U. S. 319, 327; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. Petitioner, unable to defend himself, had no opportunity to be heard when before trial he had no counsel at all to prepare his defense. *Powell* v. *Alabama, supra; White* v. *Ragen, supra; House* v. *Mayo*, 324 U. S. 42; see *Adams* v. *U. S. ex rel. McCann, supra*, at p. 279.[17] Nor was the opportunity to be heard provided when petitioner got counsel in the commencement of a trial that continued on without a gap to provide the bare opportunity for a late attempt at preparation. *Powell* v. *Alabama, supra; Cooke* v. *United States*, 267 U. S. 517; *Jones* v. *Commonwealth of Kentucky*, 97 F. (2d) 335 (C. C. A. 6th); *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Ex Parte Sharp*, 33 F. Supp. 464 (D. C. Kans.).[18] When counsel, like petitioner, was "precipitated" into a proceeding of "breathless speed" which made the trial a "swift, reckless pretense", there was no opportunity to be heard. See

[17] This common sense approach to common-decency has been widely adopted in various courts. See, for examples, *Jones* v. *Commonwealth of Kentucky*, 97 F. (2d) 335 (C. C. A. 6th); *Potter* v. *Dowd*, 146 F. (2d) 244 (C. C. A. 7th); *Azzolin* v. *United States*, 2 F. (2d) 15 (C. C. A. 8th); *Louie Yung* v. *Colman*, 5 F. Supp. 702 (S. D. Idaho); *Batchelor* v. *State*, 189 Ind. 69; *Commonwealth* v. *O'Keefe*, 298 Pa. 169; and see the old case of *The People ex rel. Burgess* agt. *Risley*, 66 How. Pr. (N. Y.) 67, 69 (1883) in which the court faced with this problem under the state's constitution took the same view of pre-trial assistance of counsel and stated simply: "This construction is demanded by every consideration of humanity and the enlightened views of personal rights resulting from Christian civilization."

[18] Cf. *Glasser* v. *United States*, 315 U. S. 60; and see, too, *Smith* v. *State*, 123 Neb. 17, 19; *Cooper* v. *State*, 120 Neb. 598, 600.

Powell v. *Alabama*, *supra* at p. 58; *Robinson* v. *Johnston*, 50 F. Supp. 774, 776 (N. D. Cal.); *Ex Parte Sharp*, *supra* at p. 466.

The case here is remarkably like the *Powell* case. Admittedly, that case has the more pungent atmosphere of an interracial conflict. However, the two cases are almost identical in their essentials and in their details. There the defendants were "hauled back and forth under guard of soldiers." Here petitioner was hauled back and forth under guard of federal officers. There defendants charged with a capital offense were "put in jeopardy of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." Not quite so in this case. Here petitioner, charged with a capital offense, was already in jeopardy for his life when counsel for the first time charged with any degree of responsibility began to represent him. There; "during perhaps the most critical period of the proceedings * * * from * * * arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." So, too, here except that the period in *Powell* was six days, and here trial followed immediately upon arraignment with less than one day separating petitioner's arrival in Nebraska from his arraignment.[19]

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[19] The *Powell* case reversed convictions. No appeal from petitioner's conviction was ever perfected. The difference is immaterial for it is well settled that in this type of case the taking of an appeal is not a prerequisite to release on *habeas corpus*. *Hans Nielsen, Petitioner*, 131 U. S. 176; *Johnson* v. *Zerbst*, 304 U. S. 458, 467; *Smith* v. *O'Grady*, 312 U. S. 329; *Williams* v. *Kaiser*, 323 U. S. 471, 477. Indeed, apart from the foregoing authorities, to hold otherwise would pile injustice upon injustice. See Point B I *infra* p. 46; *Williams* v. *Kaiser*; and *Johnson* v. *Zerbst*; both *supra*.

On the negative side, apart from petitioner's proceedings, the diligence of counsel has unearthed no reported authority which sanctions what happened here, and which still stands unreversed and unrepudiated.[20]

The decision of the court below stands alone unsupported by authority, and we believe, reason or conscience. The Supreme Court of Nebraska, in accordance with its settled practice in *habeas corpus* cases,[21] passed upon the merits

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Perhaps, it is unnecessary to remark that *Betts* v. *Brady*, 316 U. S. 455, is not applicable. That decision still marks the limits of the *Powell* case, not on the issue here, but on the right of a defendant to the appointment of counsel. Whatever may be thought of the *Betts* decision (see *Williams* v. *Kaiser*, No. 102, Oct. Term 1944, Brief for Petitioner, pp. 20-43, and authorities and comments therein cited), it is not involved in this case. With the right to public counsel apparent and not in issue, the question here relates solely to deprivation of the effective assistance of counsel. If *Betts* were a case in our field of discussion, it would still be inapposite. There the crime was not a capital one; the state law required no appointment of counsel; a jury was waived and the trial court was enabled to enforce fairness; the case was deemed simple and the defendant deemed on the record able to defend himself. Those are the facts of the *Betts* case as recounted in the majority opinion of the Court. Here the charge was a capital one; the state law required public counsel to act; there was a jury and the trial court did not enforce fairness (p. 32, *supra*); the case was not simple and neither petitioner nor his counsel was able to defend petitioner (pp. 25-32, *supra*).

[20] The Court of Appeals for the District of Columbia by a two to one majority found no violation of due process in a case in which counsel was appointed on the day of trial of a robbery charge. Counsel, so appointed, knew something about the proceeding because of his previous handling (on retainer) of reduction of bail; was assisted by counsel for co-defendants who had adequate time for preparation; and was found to have done all that could have been done in protection of the interests of the accused. *Neufield* v. *United States*, 118 F. (2d) 375, cert. den. 315 U. S. 798. But the writer of a later Court of Appeals opinion has since recognized that the *Neufield* case, which does not approach the grimness of the matter here, was wrongly decided. *Edwards* v. *United States*, 139 F. (2d) 365, 367, cert. den. 312 U. S. 769.

[21] *Habeas corpus* is the proper remedy in Nebraska for assertion of violation of constitutional rights particularly pertaining to deprivation of counsel, *Davis* v. *O'Grady*, 137 Neb. 708, cert. den. 311 U. S. 682; *Alexander* v. *O'Grady*, id. 645, cert. den. 311 U. S. 682; *In Re Application of Carper; Tesar* v. *Bowley*, 144 Neb. 623; see *In Re Application of Tail, Tail* v. *Olson*, 144 Neb. 820; and for the assertion of violation of constitu-

of the matter and rejected petitioner's contention. The court reasoned (R. 51):

> "Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—'should not be tolerated.' *Hubbard* v. *State*, 65 Neb. 805." [22]

The facts of *Hubbard* v. *State* are rather interesting and should be noted. They are set forth in the margin.[23]

If petitioner made any attempt at "procrastination", it occurreed at the time of his arraignment on the morning following the day that he was brought to Omaha from the federal penitentiary at Leavenworth. Admittedly, he did request at least twenty-four hours in which to consult counsel, examine the charge, subpoena witnesses and prepare a defense (R. 18, 4), and in desperation, perhaps to secure counsel if possible, for public counsel had washed their hands of the case the night before (R. 12, 4). Admittedly, that modest demand, made without counsel to advise him,

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tional rights in general, *In Re Havlik*, 45 Neb. 747 (commitment without authority of law); *Michaelson* v. *Beemer*, 72 id. 761 (lack of jury trial); *In re Resler*, 115 id. 335 (double jeopardy); *Kuwitzky* v. *O'Grady*, 135 id. 466 (no statute authorizing sentence imposed); see *In Re Betts*, 36 id. 282; *In Re Application of Maher*, *North* v. *Dorrance*, 144 id. 484; *Smith* v. *O'Grady*, 312 U. S. 329, 332.

[22] The court also complained of the assumed failure of petitioner to set forth facts to establish his innocence which he was prevented from establishing at the trial. As to this complaint, we have in the text already discussed its lack of basis in fact and law. Please see pp. 26 ff. *supra*.

[23] *Hubbard* v. *State* affirmed a conviction for rape. The point disposed of was not one involving a right to the effective assistance of counsel, but the correctness of a trial ruling denying a continuance. Hubbard, bound over after a preliminary hearing, was released on his recognizance. He fled from Nebraska. There was strong evidence of his guilt including his own admissions. He tried to suppress and stifle the prosecution. Denial of a continuance requested for obtaining witnesses was affirmed with the statement: "Instead of pursuing witnesses, he was fleeing from justice." *Hubbard* v. *State*, at p. 806. With that decision, we have no quarrel.

was unnecessary; for it has been repeatedly held that, even in the absence of a request, it is the duty of a trial court to protect the constitutional rights to counsel of an accused, situated as was petitioner here.[24] But, obviously, petitioner's case under the Fourteenth Amendment is not vitiated because he called the trial court's attention to its duty under the Fourteenth Amendment. Petitioner's complaint is not merely that he was denied a continuance of at least twenty-four hours. That item in the totality of facts adds little weight to the mass which bore him down. Petitioner's complaint is fundamental, invoking the protection of our Constitution. He claims that in the whole process he was hurried to conviction with such expedition as to deprive him of the effective assistance of counsel. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244; cf. *Brown* v. *Mississippi*, 297 U. S. 278, 286; *House* v. *Mayo*, 324 U. S. 42; *White* v. *Ragen*, 324 U. S. 760, 65 Supt. Ct. 978; *Jones* v. *Commonwealth of Kentucky*, 97 F. (2d) 335, 337 (C. C. A. 6th).

It is no answer to that basic claim to observe, as did the court below (R. 51), that a period of "over a month" intervened between preliminary hearing and trial. If the question had been whether there was adequate opportunity to procure counsel, it would have been pertinent to observe further that: (1) petitioner was in jail throughout that period and in custody at all times throughout his trial; (2) it is of the very essence of jail that it deprives one of liberty of action; and this has been widely recognized in decisions

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[24] *Tompkins* v. *Missouri*, at p. 487; *Glasser* v. *United States*, at p. 71; *Johnson* v. *Zerbst*, at p. 465; *Powell* v. *Alabama*, at p. 71; all *supra*; *Voight* v. *Webb*, 47 F. Supp. 743 (E. D. Wash.); *Batchelor* v. *State*, 189 Ind. 69; see *Cooke* v. *Swope*, 109 F. (2d) 955 (C. C. A. 9th); cf. *Brown* v. *Mississippi*, 297 U. S. 278, 287. Perhaps the best exploration of the considerations that enjoin upon a trial court the duty of protecting the constitutional rights of a defenseless prisoner is that of the Court of Appeals for the District of Columbia in *Boykin* v. *Huff*, 121 F. (2d) 865, 870.

pertinent to the hypothetical question under discussion;[25] (3) the jail here was not in Omaha, Nebraska, where the crime and trial occurred but at Leavenworth, Kansas;[26] (4) the relevant period would be the interval between arraignment and trial;[27] and (5) here there was no such interval—trial followed immediately upon arraignment.

But, fundamentally, the question before the Court is not one of lack of time to procure counsel. To an accused unable in ignorance and poverty to defend himself or to pay another to do it for him, it is no matter that he has "over a month" to do either. *Johnson* v. *Zerbst*, 304 U. S. 458 (two months held irrelevant). The impossible task of Sisyphus gets no lighter through eternity. Regrettably, the search for significance in an irrelevant unit of time ("over a month") obscured the reality of a man defenseless in the face of death.

Finally, there remains to be noted only the simple fact that petitioner's case, in its essentials, rests squarely upon the official record of the proceedings that sent him to prison

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[25] See *Stagemeyer* v. *State*, 133 Neb. 9; *Batchelor* v. *State*, 189 Ind. 69, 78; *Boykin* v. *Huff*, 121 F. (2d) 865, 870 (App. D. C.); *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Ex Parte Sharp*, 33 F. Supp. 464 (D. C. Kans.); cf. *Ex Parte Hull*, 312 U. S. 546; *Tompkins* v. *Missouri*, 323 U. S. 485, 487; *Beebe* v. *Sanford*, 138 F. (2d) 412 (C. C. A. 5th); *United States* v. *Masaaki Kuwabara*, 56 F. Supp. 716 (N. D. Cal.).

[26] Cf. *Johnson* v. *Zerbst*, 304 U. S. 458; *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Robinson* v. *Johnston*, 50 F. Supp. 774 (N. D. Cal.).

[27] This would be plain in any case where, as in this case, the defendant's first knowledge of the contents of an information is derived from a reading at arraignment; and particularly so, here, for it is held in Nebraska that a criminal prosecution does not begin until the proper filing of an information, *State* v. *Robertson*, 55 Neb. 41; cf. *Gilmore* v. *United States*, 129 F. (2d) 199, 203 (C. C. A. 10th), cert. den. 317 U. S. 631. As valuated by the Court in the *Powell* opinion at p. 56: "perhaps, the most critical period of the proceedings [is] from * * * arraignment until the beginning of * * * trial." See in accord on that point, *Eyer* v. *Brady*, 128 F. (2d) 1012 (C. C. A. 4th), cert. den. 317 U. S. 679.

for life. This is not a case in which allegations taxing credulity must be heard to insure at all costs the protection of the Constitution should those allegations peradventure prove true. Cf. *Waley* v. *Johnston*, 316 U. S. 101, 104; *Walker* v. *Johnston*, 312 U. S. 275, 287. Nor is this a case which depends on the required assumption that allegations are true in the absence of a warden's return or contradiction by the official record. Cf. *Williams* v. *Kaiser*, 323 U. S. 471, 474; *Tompkins* v. *Missouri*, 323 U. S. 485, 486; *House* v. *Mayo*, 324 U. S. 42, 45. Petitioner's allegations heighten or depress the color of the case a bit at immaterial points. But the official transcript of proceedings, attached to his petition, alone fully proves his case. It shows the complicated nature, the too quick timing, and the too short duration of the proceedings. It shows that petitioner, poor and ignorant, got counsel after trial for a capital offense had begun. It shows the futility of the hurried effort at defense that followed. So much, proven by the transcript, should suffice in the light of the controlling authorities cited.[28] If this be true, we respectfully request the Court to say so.[29]

In conclusion, we repeat that there is no reason to depart from the favorable view of the merits of petitioner's contention indicated by the Court in *Ex Parte Hawk*, 321 U. S. 114. The pertinent authorities and every consideration of "essential fairness" (*Adams* v. *U. S. ex Rel. McCann*, 317 U. S. 269, 279) inherent in the "fundamental principles of liberty and justice" (*Lyons* v. *Oklahoma*, 322 U. S. 596, 601) require the affording of a hearing to petitioner in proof of the fact that he was hurried to conviction in a capital case with such expedition as to deprive him of the effective assistance of counsel.

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[28] As we read the opinions of the Court, probably less would do.

[29] Please see p. 54, *infra*.

II. *Petitioner is Entitled to be Heard upon his Allegations that his Conviction was Obtained by Perjured Testimony Knowingly Used by the Prosecution.*

Here, again, there is no reason for the Court to depart from *Ex Parte Hawk*, 321 U. S. 114.[30]

Petitioner's claim of a hurried conviction without the effective assistance of counsel rests, as we have seen, essentially upon the record of his conviction—the official transcript of proceedings. But his claim of perjury necessarily rests upon his personal allegations for the official record manifestly could not controvert or prove the charge. See *Pyle* v. *Kansas*, 317 U. S. 213, 215. And petitioner's allegations are not stated with desirable precision and clarity. They are about what could be expected of a layman and pauper unskilled in the law who draws his petition behind prison walls.[31]

Yet he does flatly allege that "your Petitioner's Trial and Conviction was (sic) obtained by the use of perjured testimony knowingly used by the Prosecuting Officials" (R. 15). Ungrammatical as they may be, those allegations do state plainly the ultimate facts of a violation in this respect of the due process clause. *Mooney* v. *Holohan*, 294 U. S. 103, 112; *Pyle* v. *Kansas*, 317 U. S. 213, 215-216; *Lutz* v. *Ragen*, 324 U. S. 760, 65 Sup. Ct. 978, 980. No more than that is required.

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[30] Discussing petitioner's allegations there which were in substance those made here, the Court in *Ex Parte Hawk* stated its inability to say that petitioner is not entitled to a hearing in proof of his perjury contention.

[31] "The petition is not drawn with desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. If we were to take that course, we would compound the injury caused by the original denial of counsel." *Tompkins* v. *Missouri*, 323 U. S. 485, 487; and see, too, *Rogers* v. *Alabama*, 192 U. S. 226; *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Cochran* v. *Kansas*, 316 U. S. 255, 258; *Pyle* v. *Kansas*, 317 U. S. 213, 215; *Rice* v. *Olsen*, 324 U. S. 786, 65 Sup. Ct. 989, 992.

There is nothing peculiar about a petition for *habeas corpus* requiring a departure from the general rule that ultimate fact and not evidence is pleaded. This is particularly so since there is available to any court the familiar recourse of a rule to show cause before issuance of a writ.

The Court has repeatedly deemed allegation of the ultimate facts in a petition for *habeas corpus* sufficient for a *prima facie* showing of due process violation necessitating a hearing in proof. See *Pyle* v. *Kansas*, 317 U. S. 213, 215 (perjury allegations stated in terms substantially identical to petitioner's allegations found sufficient); and *Williams* v. *Kaiser*, 323 U. S. 471; *Tompkins* v. *Missouri*, 323 U. S. 485; in both of which cases statements in petitions for *habeas corpus* of the ultimate facts as to deprivation of counsel were found sufficient. *Walker* v. *Johnston*, 312 U. S. 275, 286, drives the point home. In that case apparently a petition alleging evidentiary facts was found sufficient because those allegations if proven "would support" a finding of ultimate facts concerning an unconstitutional denial of counsel.[32]

On the foregoing authorities, petitioner's allegations of conviction by the knowing use of perjured testimony are sufficient.

However, petitioner, although not required to do so, does allege in supporting detail perjured testimony knowingly used by the prosecution in obtaining his conviction.

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[32] To be sure in a case such as *Cochran* v. *Kansas*, *supra*, where the petition gives evidentiary detail or supporting affidavits the Court has noted the fact. But evidentiary detail and supporting affidavits have not been made requirements. To the contrary, it is settled that the uncontradicted allegations of a petition are taken as true for the purpose of determining whether they state a *prima facie* case for hearing. *Cochran* v. *Kansas*; *Williams* v. *Kaiser*; *Tompkins* v. *Missouri*; all *supra*; *House* v. *Mayo*, 324 U. S. 42, 45. For the sake of completeness, we note that the two affidavits mentioned in the Court's opinion in *Cochran* v. *Kansas* boil down essentially to what Cochran told his fellow prisoners. See the Record at pp. 17-18 in No. 510, Oct. Term 1942.

He charges that the testimony of Nowicki, the accomplice, implicating him in the crime, was perjury obtained by bribery (R. 7). And he offers, in at least partial support of that allegation, evidence in the care and custody of Frank Marsh, Secretary of State of Nebraska (R. 7).

Fairly interpreted, he charges too that Taylor, the man who killed Perelman, committed perjury in his sworn, prior statement implicating petitioner which was given to the prosecution. He says specifically, too, that Taylor "was threatened and told by the prosecuting officials he would never live to get out of the penitentiary if he didn't take the stand and swear that Henry Hawk shot Isadore Perelman." (R. 7-8) Respondent's counsel does not meet these allegations by urging that Taylor testified in petitioner's favor. So Taylor did; but his prior sworn statement implicating petitioner and claimed to be perjured went to the jury as substantive evidence with the knowledge of the prosecution. Here the layman's crude sense of "what hit him" is better than lawyer's refinement. If we regard substance rather than form, petitioner's allegations as to Taylor are relevant to his contention of perjury. *Cf. Brown* v. *Mississippi*, 297 U. S. 278, 286.[33]

Finally, it will not be amiss at the hearing in proof of petitioner's perjury contention to clear up the tantalizing mystery of the two doctors. It needs investigation. Petitioner alleges that Dr. McCleneghan committed perjury (R. 5). McCleneghan's testimony at the trial was essential to conviction. The coroner's county physician, he testified that a bullet removed by him from the body of the deceased at the morgue and personally marked "S" by him caused Perelman's death. (Other witnesses traced bullet "S" to the De Santi-Nowicki-Taylor gun.) Petitioner in this con-

[1] Those allegations give some point to petitioner's charge (R. 15) that the trial court also knew of the use of perjured testimony.

nection alleges that bullet "S" was removed and marked by a Dr. C. J. Toohey, physician at Lord Lister Hospital, before the death of Perelman; and that Dr. Toohey so testified at the preliminary hearing. True, the transcript of the preliminary hearing fails to include any testimony by Dr. Toohey (P. H. "Index"). Yet without such a witness there was no evidence of a death at a hearing upon a charge of murder. It is difficult to believe that experienced prosecuting officials could have been guilty of so fatal an omission. Dr. C. J. Toohey exists (R. 18). His name with his address at Lord Lister Hospital was endorsed upon the information by the prosecuting attorney as a witness for the State.

Petitioner alleges the ultimate facts governing his perjury contention. He gives, too, extensive supporting detail.[34] So much, certainly, is sufficient to entitle him to be heard in proof of his allegations.[35]

The court below (R. 49) rejected the perjury contention on the merits. However, it added that if petitioner's allegations showed him to be "wrongfully convicted" his remedy would not be *habeas corpus* but *coram nobis*. The court reasoned (R. 49-50):

> "The writ of error *coram nobis* has been recognized in this state. Carlsen v. State, *supra*. The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of trial through no lack

[34] In his ignorance, petitioner mixes his perjury allegations with extraneous matters such as the lack of corroboration of Nowicki's testimony and the impeachment of Taylor. These have some relevance to other branches of his case. Of course, the addition of this material does not subtract from the allegations petitioner does make concerning the knowing use of perjury to convict him. Cf. *Rogers* v. *Alabama*, 192 U. S. 226.

[35] If this were not so, it would still be enough that the nature of his claim is clear. Even if the petition were insufficient in substance it could be amended in the interest of justice. *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Rice* v. *Olsen*, 324 U. S. 786, 65 Sup. Ct. 989, 992; *Tompkins* v. *Missouri*, 323 U. S. 485, 487.

> of reasonable diligence on his part, which, if known at the time of the trial would have resulted in a different judgment. As stated in Carlsen v. State, *supra*: '* * * the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. * * * Habeas corpus is not a proper remedy to release one from prison who has been wrongfully convicted.' "

But this in its complete misconception of the nature of petitioner's contention presents no adequate, alternative state ground of disposition. Cf. *Williams* v. *Kaiser*, 323 U. S. 471, 477-8; *Rogers* v. *Alabama*, 192 U. S. 226, 230; *Bryant* v. *Zimmerman*, 278 U. S. 63, 67. The Attorney General of Nebraska rightly did not claim that it does. Respondent's "Brief in Resistance," pp. 12-16. Petitioner complains not of an error of fact at the trial to be corrected by newly-discovered evidence. He alleges a violation of the Constitution because state officials knowingly used perjured testimony to convict him. By a well-settled line of decisions of the Supreme Court of Nebraska (see p. 35, fn. 21, *supra*), *habeas corpus* is available to review a conviction obtained in violation of the Constitution. It is noteworthy in this connection that the court below, misconceiving the point, does not refer to that line of its own decisions but does refer to *Carlsen* v. *State*, 129 Neb. 84, which did involve an error of fact rather than a charge of due process violation. In the circumstances, we submit that the only adequate ground of disposition by the court below was its disposition on the merits of the constitutional contention as to perjury; and that, hence, petitioner is entitled to a reversal and hearing on his perjury allegations.

Moreover, the writ of *coram nobis* is not available to petitioner. There is no issue as to that. The Attorney

General of Nebraska agrees (Respondent's Brief in the court below, p. 38). Through no fault of his own,[36] he is barred by statutes of limitation from pursuing that recondite remedy.[37] *Newcomb* v. *State*, 129 Neb. 69; Comp. Stats. Neb. (1929) Sec. 20-2008; Rev. Stats. Neb. (1943) Sec. 25-2008. The Court, therefore, should not assume that he is also barred from *habeas corpus*, for if that be true the State of Nebraska "provides no judicial remedy whatever for petitioner". See *Smith* v. *O'Grady*, 312 U. S. 329, 332; *Rice* v. *Olson*, 324 U. S. 786, 65 Sup. Ct. 989, 992; *Mooney* v. *Holohan*, 294 U. S. 103, 113. In the *Smith* and *Rice* cases, the Court twice refused to agree with the contention that *habeas corpus* is not available in Nebraska for this or that particular violation of the Constitution. In our view, this case provides an appropriate third occasion.

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[36] See the authorities cited at p. 34, fn. 19, *supra*, and *Potter* v. *Dowd*, 146 F. (2d) 244 (C. C. A. 7th); *Boyd* v. *O'Grady*, 121 F. (2d) 146 (C. C. A. 8th).

[37] In modern times, the common-law writ of *coram nobis* is an elusive thing beyond the reach of a layman, and indeed beyond the sure grasp of many skilled in the law. Contrast the opinion below (R. 49) and the thoroughgoing discussion of *coram nobis* in *Carlsen* v. *State*, 129 Neb. 84, to the thoroughgoing discussion of *coram nobis* in *Jones* v. *Commonwealth*, 269 Ky. 779. The authors of the Nebraska opinions admit uncertainty as to the exact limits of *coram nobis* but are fairly satisfied that it covers newly-discovered evidence. The authors of the Kentucky opinion likewise admit uncertainty as to exact limits of coverage but are fairly satisfied that it does not cover newly-discovered evidence.

The *Carlsen* opinion, upon which the court below relied, preceded by one day the enactment of a statute which appears to abolish *coram nobis* in Nebraska. That enactment was not noted by the court below. It is at least doubtful that upon a complete consideration *coram nobis* would be found to exist in Nebraska. In any event, if it exists at all it is not available to petitioner. For a discussion of the problem, not pertinent here, of the existence of *coram nobis* in Nebraska see Note, 19 Neb. Law Bull. 159.

B. PETITIONER IS ENTITLED TO A HEARING UPON HIS ALLEGATIONS THAT IN HIS TRIAL AND CONVICTION HE WAS DENIED EQUAL PROTECTION OF THE LAWS OF NEBRASKA.

We have urged in Part A, *supra*, the affording of a hearing to petitioner because he has sufficiently alleged *prima facie* violation of the due process clause in two separate respects: first (pp. 22 to 39, *supra*) he was hurried to conviction with such expedition as to deprive him of the effective assistance of counsel; and second (pp. 40 to 45, *supra*) his conviction was obtained by the use of evidence known by the prosecution to be perjured.

We urge now in Part B the affording of a hearing to petitioner because he was denied equal protection of the laws in two separate respects: first (Point I, *infra*) he was deprived of the appeal accorded to others by the laws of Nebraska; and second (Point II, *infra*) with regard to the method by which he was brought into the State of Nebraska and imprisoned he was not accorded the same treatment as the law of Nebraska accords to others similarly situated.

1. *Petitioner is Entitled to Be Heard Upon His Allegations that He Was Deprived of the Appeal Accorded to others by the Laws of Nebraska.*

Following conviction for first degree murder, petitioner was deserted by counsel (R. 10). In his own behalf, he filed in the Trial Court a notice of appeal, poverty affidavit and request to proceed as a pauper (R. 10; 29-31). The request was granted. The Trial Court ordered that its Clerk and Stenographic Reporter "respectively prepare and deliver to the defendant a Transcript of Proceedings and a Bill of Exceptions." See the order at R. 30. "But for some reason best known to the Trial Court and Prosecuting Officials the appeal documents were impounded and

consealed (sic) and never delivered to your Petitioner." See petitioner's allegation at R. 10. Petitioner, on his own, made various moves in the Supreme Court of Nebraska to protect his appeal rights. These were apparently misguided and, in any event, were unsuccessful (R. 10). After loss of appeal rights, the Court's Stenographic Reporter advised that the Bill of Exceptions was in the prosecuting attorney's file (R. 11).

The Court's decision in *Cochran* v. *Kansas*, 316 U. S. 255, governs decision on these facts. Pursuant to *Cochran*, petitioner is entitled to be heard upon this *prima facie* case of denial of equal protection, uncontradicted upon the record here. See, too, *Hysler* v. *Florida*, 315 U. S. 411, 422-3; *Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C.); *Ex Parte Sharp*, 33 F. Supp. 464 (D. C. Kans.); *State* v. *Guerringer*, 265 Mo. 408. It is immaterial, of course, that in the *Cochran* case, state officials at the prison impounded and concealed appeal papers, whereas here state officials at the trial court and office of the prosecuting attorney did the "impounding and consealing (sic)." *Mooney* v. *Holohan*, 294 U. S. 103, 112-3, and decisions of the Court therein cited. Nor, in the light of the *Cochran* case, can it matter that petitioner having alleged that he was "deserted by counsel" (R. 10) failed to allege that "he ever requested [counsel] to appeal"; or that having alleged nondelivery, impoundment, and concealment of his appeal documents "for some reason best known to the Trial Court and Prosecuting Officials" (R. 10), he failed to allege "in what manner they were impounded and concealed" so that the Bill of Exceptions reached the file of the prosecuting attorney. Cf. the opinion of the court below at R. 50.

While the State of Nebraska accords a right of appeal to those convicted of crime, it must accord that right to all, including petitioner. He must not be singled out for invidious treatment by action of Nebraska officials.

In so holding in relation to substantially the same case in Kansas, the *Cochran* decision is but a facet of a many-pointed but continuous mass of constitutional doctrine. Uniform treatment must be accorded to all who are similarly situated—in the administration of the criminal law, *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Moore* v. *Missouri*, 159 U. S. 673, 677-678; *Betts* v. *Brady*, 316 U. S. 450, 463; —in the administration of all justice, civil or criminal, *Ughbanks* v. *Armstrong*, 208 U. S. 481, 487; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Ex Parte Lange*, 18 Wall. 163; *In Re Ah Fong*, Fed. Cas. No. 102 (C. C. D. Cal.)—and finally in the operation of all laws, Amendment XIV to the Constitution.

The injury to petitioner from denial to him of a right of appeal was serious. Query whether there was sufficient evidence to go to the jury. Highly prejudicial statements going to the crux of the case, which were made out of court and not subject to cross-examination, went to the jury in plain error. See the discussion at pp. 29 to 32, *supra*. Almost certainly petitioner's conviction would have been reversed on appeal had an appeal been accorded to him.[38] The loss to petitioner thus far has been eight years of liberty.

The petition here gives the kind of detail that makes a contention highly believable. There is the simple fact of a court order to court officials to prepare appeal documents and deliver to petitioner. There is the further simple allegation that the appeal documents prepared by court officials were never delivered to petitioner. And, finally, some of the documents ended up in the wrong file.

Yet less than intentional discrimination against petitioner should suffice in proof of a violation of the Fourteenth

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[38] Hence it adds little to the hurt resulting from deprivation of an appeal that the Supreme Court of Nebraska has the statutory power to reduce sentence on appeal, and does. See, as examples, *Nelson* v. *State*, 33 Neb. 528 (Life sentence for murder reduced); *Wiedeman* v. *State*, 141 Neb. 597 (Sentence for rape reduced).

Amendment shading off from equal protection into due process. See the opinion of the Court of Appeals for the District of Columbia, per Rutledge J., in *Boykin v. Huff*, 121 F. (2d) 865, 870. Discussing a record which showed that a convicted pauper, jailed and acting without counsel, was misled as to appeal rights by an unintentional omission of the Trial Court to inform him fully, the opinion proceeds:

> "In an entirely negative sense, nothing was done, so far as the record shows, which infringed any right appellant may have had. But to some extent, when the fundamental rights of citizens are at stake, more especially when they are those of indigent persons relating to their lives or personal liberty, there is an affirmative duty, which, however undefined in ultimate scope, requires not only that the court not mislead, but that it positively and fully inform the accused concerning his basic rights. This obligation assumes special authority when he is not represented by counsel and is confined in prison and unable to speak for himself except by mail. Nor is it lessened by conceptions of official propriety which, however sincerely entertained, have the effect, though not intended, of foreclosing fundamental rights. These do not give way to an etiquette appropriate for use in other circumstances. Judicial objectivity may be served by keeping hands off when parties are adequately represented. But that is not true when poor persons have no counsel and the effect of inaction is to commit the preservation of their elemental rights to their own ignorance."

II. *Petitioner is Entitled to Be Heard upon His Allegations That He Was Denied the Equal Protection of the Laws in Being Brought by Nebraska Officials Into Nebraska and Incarcerated Without Regard to the Law of Nebraska.*

At the outset on this branch of the case, we state that we do not urge the granting of a hearing to petitioner because, entirely apart from Nebraska law, he was twice brought

into Nebraska without regard to Article IV Section 2 of the Constitution governing extradition. Petitioner has strongly pressed upon counsel (appointed) to argue that contention; and the contention is not without merit. See the dissenting opinions in *Mahon* v. *Justice*, 127 U. S. 700, 715; *Pettibone* v. *Nichols*, 203 U. S. 192, 217. Yet in fulfilment of our assignment, it has not seemed wise in our judgment to obscure the solid basis in precedent of petitioner's case on four points by attempting an uphill argument on a dubious fifth point in the face of the *Mahon* and *Pettibone* majority opinions.

However the *Mahon* and *Pettibone* opinions both recognize the right of a State to adopt its own rule governing treatment of the prosecution or imprisonment of a person brought into the state without extradition process. *Mahon* v. *Justice, supra*, at p. 715; *Pettibone* v. *Nichols, supra*, at p. 212; *Ker* v. *Illinois*, 119 U. S. 436, 444. Pursuant to its right, the State of Nebraska has seen fit to apply the rule that a person otherwise lawfully imprisoned is entitled to release if brought into the state by agents of the State without extradition process. *In Re Robinson*, 29 Neb. 135; *Kendall* v. *Aleshire*, 28 Neb. 707. That is the law of Nebraska as declared, in the absence of statute, by its Supreme Court in *In Re Robinson*. Pursuant to that law, the Supreme Court of Nebraska in the *Robinson* case granted an original application of *habeas corpus* to one brought by Nebraska agents into Nebraska without extradition and jailed there. That is exactly what petitioner alleges happened to him (R. 12-13).

This contention was urged upon the court below and the case of *In Re Robinson* cited (R. 14). It was met with a statement of the contention and the comment that the contention is "without merit". See the opinion of the court below at R. 47.

We should think it unnecessary to point out that a decision

of the highest court of a State which solemnly declares the law of the State necessarily has been one of general applicability to all within its coverage. Such a decision perforce cannot be and has not been considered a sport in the process of judicial administration. But the law so declared has not been applied to petitioner, although he was so plainly within its coverage. In the interest of space saving, we do not repeat here the settled doctrine of the Court (see pp. 46 to 49, *supra*) which requires that petitioner in this respect, too, be afforded a hearing in proof of his allegations of denial of equal protection.

Conclusion

Counsel does not know whether Henry Hawk was in truth innocent or guilty.[39] True, he has been twice convicted of other offenses against society, the natures of which do not appear. Yet apart from Taylor and Nowicki, only Henry Hawk could know whether he is guilty of the crime for which he was convicted, that is, whether he was or was not with Taylor on the night that Taylor killed. Henry Hawk says he is innocent (R. 12). No other human being could know; or even guess with any confidence. In just appraisal of his trial and the evidence there adduced, an impartial student can say with confidence only that he should have been acquitted. Yet he was condemned without hearing, or without the substance of a hearing, which is the same thing. Beyond this, we suggest that the central iron of due process—"condemn ye not, before ye have heard"—appears to be a restraint upon men that ever sits uneasily. The evidences are on every hand. People in their personal relationships, in their ordered social relationships, hasten almost naturally to condemn without hearing, even to contemn. It is as if the hard yoke of due process forged

[39] Counsel has never met him.

through the centuries by the unremitting toil of the just is corroded daily by the sweat of conflict and prejudice. Probably for reasons such as these, the Court has hewn strictly to the line that the sole question is whether constitutional rights have been preserved. Innocence or guilt is irrelevant. *Moore* v. *Dempsey*, 261 U. S. 86, 87-88; *Glasser* v. *United States*, 315 U. S. 60, 75-76.

So, too, the experience of Nebraska with the petitions of others for *habeas corpus* appears largely not pertinent here. The dissenting Justices in *Rice* v. *Olsen*, 324 U. S. 786, *supra*, because of scanty allegations there, placed some weight on statements of the Attorney General of Nebraska concerning petitions for *habeas corpus* (*Rice* v. *Olsen*, No. 391 Oct. Term 1944, Brief for Respondent, p. 25). In the *Rice* case, the Attorney General claimed: first that there had been many petitions in Nebraska in the later years; we comment that this cuts both ways; second, that many hearings had been granted on those petitions; we note that in years of trying petitioner, here, has yet to obtain a hearing; third, that in the hearings said to have been granted in other cases proof has failed; we recall that here the hurrying to conviction with deprivation of the effective assistance of counsel is apparent on the official record of proceedings without need of further proof; and fourth, the Attorney General said that the many petitions filed had borne the stamp of one author, a prison inmate. If this last be true, surely, the necessity for it can only be regrettable. We will yet reach the time when by statute or constitutional provision imprisoned paupers convicted without counsel need not rely, almost everywhere but in this Court, upon their own meager intellectual resources to obtain complicated things like due process and equal protection of the laws.

Finally, while we proceed with diffidence, we feel that duty calls for discussion of a delicate matter. If lawyers

y be permitted to comment favorably on the work of dicial officers, we do not hesitate to say, on the basis of udy of many Nebraska decisions, that the work of Neaska's courts and its chief law officers achieves a high el of excellence. Yet, somehow, at least in the later ars, there seems to be an atmosphere of inattention enloping matters concerning Henry Hawk. In that atmosere it becomes possible for the State's law officers to say petition here makes "no complaint" that public counsel l not properly represent petitioner "throughout his al" (Respondent's Brief "In Resistance", p. 11). It comes possible, too, to say that Taylor testified against titioner at the preliminary hearing when he did not (id. 15). Likewise, the State district court can find the tition here identical to a very different earlier one (p. 17, *pra*); and the State's law officers, commenting on that ding, can say the district court "apparently investited the records of the district court sufficiently to astain" the correctness of its finding (Brief for Respondt (appellee) below, p. 17). Of Henry Hawk's original tition, the same in substance as his petition here, the ate's law officers could say it involved no "remote deral question" (*Ex Parte Hawk*, — Original, Oct. rm, 1943, Respondent's Brief in Opposition, p. 1). ter the State's law officers can refer many times to the ourt's opinion which did find federal questions in that rlier petition upon which petitioner was probably enled to be heard (*Ex Parte Hawk*, 321 U. S. 114, 115-116); t they can see in that opinion everything but its rtinence to this proceeding (Brief for Respondent ppellee) below, pp. 10, 17, 20, 35, 36). Both courts below n fail to note the court's opinion in *Ex Parte Hawk*. nd both can pass upon and reject the four federal quesons urged here without citation of a single decision of e Court.

Something is wrong. Intentional discrimination is not implied. We suggest rather that what is happening is a natural thing. There have been so many papers pertaining to Hawk (see p. 14, *supra*). Freshness of approach is lost on any succeeding item. Attention is becalmed. It becomes difficult even to recognize plain issues.

In that atmosphere, the implications of *Ex Parte Hawk* were of no avail. In that atmosphere, should the Court find merit in petitioner's case, only a definitive opinion of the Court is likely to avail. The Court's opinion in Ex *Parte Hawk* was handed down almost two years ago. It will be cold comfort for him, if two years from now petitioner reads a favorable opinion of the Court in this case by light that still filters through prison bars; for meanwhile Henry Hawk's life fritters away.

Respectfully submitted,

JOSEPH A. FANELLI,
Counsel for Petitioner.

MILTON KRAMER,
Of Counsel.

September, 1945.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944
No. 825

HENRY HAWK, PETITIONER,

V.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
For Respondent.

WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

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HENRY HAWK, PETITIONER,

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RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
Attorney General of Nebraska,
H. EMERSON KOKJER,
Deputy Attorney General of Nebraska,
For Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

This case involves an application for a writ of habeas corpus made to the District Court of Lancaster County,

Nebraska. The petition was dismissed without the issuance of a writ and an appeal taken to the Supreme Court of Nebraska; where the action of the lower court was affirmed. *Hawk* v. *Olson, Warden,* — Neb. —, 16 N. W. (2d) 181. Petitioner has now made application to this court for a writ of certiorari to the Supreme Court of Nebraska.

NATURE AND STATEMENT OF THE CASE.

The petitioner, Henry Hawk, filed his petition in the District Court of Lancaster County, Nebraska, to secure a release from the Nebraska State Penitentiary by means of a writ of habeas corpus. Included in the petition is a certified copy of the judgment of the District Court of Douglas County, Nebraska, sentencing the petitioner to confinement in the Nebraska State Penitentiary for the term of his natural life.

Since his incarceration in the Nebraska State Penitentiary, petitioner has filed numerous applications for writs of habeas corpus; to use his own words, he has "* * * by petition complained to this court and every court in the land * * *." Some of these applications are referred to in the petition and reported opinions were had in the following cases: *Hawk* v. *O'Grady, Warden,* 137 Neb. 639, 290 N. W. 911; *Hawk* v. *Olson, Warden,* 130 Fed. (2d) 910; *Ex parte Hawk,* 64 Sup. Ct. 448, 321 U. S. 448; *Hawk* v. *Olson, Warden,* — Neb. —, 16 N. W. (2d) 181.

The district court denied the petition without a hearing on the grounds that (1) the petition does not state facts sufficient to constitute a cause of action, and (2) all

of the allegations, facts and issues presented by the petition had been duly alleged, presented and fully adjudicated between the petitioner and the respondent, and his predecessor in office, in previous actions filed by petitioner in said court. The opinion of the district court (R. 52-55) is as follows:

"This matter comes before the court upon the petition for writ of habeas corpus, affidavit of poverty and motion for order allowing subpoena of and summons of witnesses without prepayment of fees and costs, and the motion for an order to amend said petition, all filed by the petitioner herein, and the court, having fully and carefully examined said petition and motions and the documents attached thereto, finds that said petition does not state facts sufficient to constitute a cause of action in favor of petitioner and against the respondent; and that, accordingly, the said petition should be dismissed for want of merit and for failure to state a cause of action, and said writ of habeas corpus prayed for in said petition denied.

"And the court further finds from an examination of said petition and motions, and from the records of this court, that the issues presented for determination in said petition have been heretofore fully and finally adjudicated between the petitioner herein and the respondent herein and the latter's predecessor in office in a similar action filed by petitioner in this court, being Docket V-98 of this court, which said action was dismissed by this court, and was thereafter appealed by petitioner to the Supreme Court of the State of Nebraska, being No. 30708 in said court, and said judgment in said action having been affirmed in said appeal by the Supreme Court of Nebraska by opinion published, 137 Neb. 639, which decision of the Supreme Court of this state

remains unreversed and unmodified, with petition for writ of certiorari in said case denied in the Supreme Court of the United States, Hawk v. O'Grady, 311 U. S. 645, 61 Sup. Ct. 11, 85 L. Ed. 412.

"The court further finds from an examination of said petition and the records of this court that all of the allegations, facts and issues, presented by plaintiff in said petition now before the court have been duly alleged, presented and fully adjudicated between this petitioner and the respondent herein, and his predecessor in office, in a previous action filed by said petitioner in this court, being numbered Docket W, pg. 124 in this court, wherein petitioner petitioned for a writ of habeas corpus, alleging the same grounds and facts and presenting the same identical issues and all of them as are now presented and alleged in the petition now under consideration of this court, and that all of said issues have been fully and finally adjudicated between said parties and adversely to said petitioner, being the petitioner herein, in said action, in which said petition for habeas corpus of the petitioner was dismissed by this court by the following order, to-wit: '18 District Court Journal "158" Lancaster County Nebraska September Term, 1941, October 28, 1941, Thirty-eighth Judicial Day. Tuesday Court met pursuant to adjournment of Monday, October 27, 1941. Present the same officers of the Court as on Monday, the 27th inst. And on this day the following proceedings were had and done: Before the Honorable FRED SHEPHERD, Judge Presiding. Henry Hawk, vs. Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, W-124. This case was on the 28th day of October assigned to me, Fred Shepherd, one of the judges of the District Court of the Third Judicial

District of Nebraska by J. H. Broady, the assignment or presiding judge of said court for the present year. The Court finds upon examination of the petition and record together with the brief attached thereto, and from a careful consideration of the same that said petition does not state facts sufficient to constitute a cause of action in favor of the petitioner and relator and against the respondent; and that accordingly the said petition should be dismissed at the costs of said petitioner and relator, taxed at $——, for which execution is hereby awarded. And the Court finds in the second place that this is a cause adjudicated, the precise case under the same title concerning the identical persons and covering the same subject matter having been considered by this court under its then docket number V-98 of this court and therein dismissed, and having soon thereafter been considered on appeal in the Supreme Court of Nebraska in No. 30708 of its cases and that the judgment of this court was therein affirmed with opinions published in Vol. 137 of the Nebr. Report at page 639, which decisions of the State Supreme Court remains unreversed and unmodified, with petition for writ of certiorari denied in the Supreme Court of the United States and this court further finds that in consequence of the foregoing the above entitled case should be dismissed as a case heretofore dismissed in all the courts in the direct proceeding at the costs of the petitioner and relator. Wherefore, the Court so dismisses the petition as a cause adjudicated at the costs of petitioner and relator, taxed at $——, for which execution is hereby awarded. To the above dismissal, whether on grounds of res adjudicata or because the petition fails to state a cause of action, and to all of the findings the petitioner and relator duly excepts and his exceptions are duly noted. Motion of petitioner

that date be set for hearing is overruled by the Court for the reasons indicated in the dismissal of the petition, to which petitioner and relator duly excepts.'

"That said previous judgment of this court dismissing the petition for writ of habeas corpus of this petitioner in said previous action, Docket W-124, was not appealed, because final, and is in full force and effect and constitutes a full and complete and final adjudication of all rights, claims, issues and contentions of the petitioner herein presented by the petition now filed and under consideration wherein petitioner prays for the issuance of a writ of habeas corpus.

"IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT that the petition in this action be and hereby is dismissed, and the writ of habeas corpus prayed for by said petitioner be and
7 hereby is denied, all at the costs of petitioner taxed at $——, for which execution is hereby awarded.

"Signed at Lincoln, Nebraska, this 29th day of March, 1944.

"By the Court,

"Ralph P. Wilson,
"District Judge."

From the judgment of the district court, petitioner appealed to the Supreme Court of Nebraska. The Supreme Court of Nebraska sustained the lower court in an opinion filed on the 3rd day of November, 1944 (*Hawk* v. *Olson, Warden*, — Neb. —, 16 N. W. (2d) 181). From this judgment of the Supreme Court of Nebraska, petitioner now seeks to secure a writ of certiorari from this court.

We have carefully examined the petition, together with the record submitted in support of the petition and the grounds which he asserts entitle him to the writ we have summarized as follows:

1. Petitioner was deprived of effective assistance of counsel.

2. That his conviction was based upon perjured testimony, to the knowledge of the trial judge and prosecuting officer.

3. The evidence was insufficient to support a conviction.

4. Error in the instructions given by the court.

5. Petitioner was denied an appeal to the Supreme Court of Nebraska.

6. That at the time of his trial he was a federal prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas; that after his conviction he was transferred to Alcatraz Penitentiary and upon completion of his term was turned over to the Nebraska authorities, who placed him in the State Penitentiary.

7. That his trial was by ordeal and mobocracy.

In our argument herein, we will consider each of these grounds and review the allegations set forth with reference to each of these charges.

SUMMARY OF POINTS AND ARGUMENT.

Point A. An application for a writ of habeas corpus must state facts sufficient to show that petitioner is entitled to the writ, and, where the facts alleged, if proven, would be insufficient to warrant the issuance of the writ the petition should be dismissed.

Point B. A charge that the evidence was insufficient to sustain a conviction does not present a federal question, since the due process clause does not imply a guarantee against an erroneous decision of a state court.

Point C. The fact that a defendant in an information is imprisoned, serving a sentence for another crime, gives him no immunity from prosecution.

Point D. In an application for a writ of habeas corpus petitioner must allege facts sufficient to entitle him to the writ, mere conclusions being insufficient.

Point E. The application for a writ of certiorari should be denied, since all of the allegations of the petition together fail to disclose a denial of due process.

ARGUMENT.

Point A.

An Application for a Writ of Habeas Corpus Must State Facts Sufficient to Show that Petitioner is Entitled to the Writ, and, where the Facts Alleged, if Proven, Would be Insufficient to Warrant the Issuance of the Writ the Petition Should be Dismissed.

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner alleges that on February 11, 1936, he was arraigned in the Municipal Court of Omaha, Nebraska, and bound over to the District Court of Douglas County, Nebraska, "without due process of law, in that said Municipal Court Judge deprived your petitioner of his fundamental right of a continuance within which to consult with counsel and prepare a defense, and forced your

Petitioner to proceed without the assistance of counsel or other defense" .(R. 7).

The charge of petitioner that these facts (if true) constitute a denial of due process is without merit. In the first place, there is no evidence that petitioner ever asked for counsel, and, even had he requested such, a denial of the request would violate no constitutional guarantees. The Supreme Court of Nebraska has held that a preliminary hearing is in no sense a trial of the person accused, but is merely a course of procedure to determine whether probable cause exists to believe that a crime has been committed, and the accused discharged or held to answer as the facts warrant. *Latimer* v. *State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403; *Van Buren* v. *State*, 65 Neb. 223, 91 N. W. 201.

In *Latimer* v. *State*, supra, the court said:

> "But the preliminary examination provided for by said section 585 of the Criminal Code is in no sense a trial of a person accused of crime. It is not even necessary that the person charged with having committed a crime on being brought before a magistrate should be asked to plead, or enter a plea of guilty, or not guilty, to the complaint. The object of the preliminary examination is to ascertain whether the crime charged has been committed, and if so, whether there is probable cause to believe that the accused committed (In re Garst, 10 Neb. 78; State v. Robertson, 55 Neb. 41)."

Petitioner then alleges that on the same day that he was arraigned in the municipal court he was also arraigned in the district court "and was asked to enter a plea to an information of an unscrupulous County At-

torney charging him with 'Murder in the first degree while attempting to rob Isadore Perelman,'" to which information petitioner pled not guilty.

This allegation of petitioner is disclosed by the petition to be contrary to the facts, since the record discloses that petitioner was not arraigned until the 17th day of April (R. 25-26). This is also supported by the latter allegation of the petition (R. 8).

Petitioner further alleges that on the 16th day of March, 1936, he was returned to Omaha and placed in the county jail, where he was held incommunicado, except that Joseph M. Lovely, Public Defender, and J. C. O'Brien, Assistant Public Defender, visited him for about fifteen minutes at about 11:15 p. m. that night. He further states that said public officers tried to intimidate him into pleading guilty "in that on conviction by a jury petitioner would no doubt but receive a death sentence, and that the County Attorney and Fritz Franks Capitan of Decetives had framed your Petitioner to conviction by the use of two convicts that were going to testify against your Petitioner."

Petitioner complains because the public defender advised him to plead guilty because if convicted by a jury he would no doubt receive a death sentence. Under the laws of the State of Nebraska upon conviction for first degree murder it becomes the duty of the jury to fix the penalty at either death or life imprisonment. We believe it to be the duty of a defense attorney, if he believes his client guilty and fears that the jury will impose the death penalty, to so inform his client and advise him to plead guilty in order to avoid the death penalty.

While petitioner uses the word "intimidate," such advice by an attorney to his client is certainly not intimidation.

Petitioner further states that he informed these public officials that he would never plead guilty, "at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioners trial scheduled for trial the following morning" (R. 8); that on the following morning, March 17, 1936, he was arraigned in the district court and pled guilty to the charge. That he moved the trial court orally for a continuance of twenty-four hours for the purpose of "consulting counsel, examine the charge, subpoena witnesses and prepare a defense," which motion was overruled by the court (R. 9); that the court began to impanel the jury and called two or three jurymen when Joseph M. Lovely, the public defender, and John N. Baldwin, his assistant, stepped forward and entered the case "without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner." He further alleges, "Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense" (R. 9).

Petitioner's charge that the two public officials left, stating that they would have nothing to do with his trial scheduled for the next morning is shown to have no bearing in his defense. Assuming this statement to be true, such action cannot constitute denial of due process, since the record discloses that the public defender and his assistant did represent the petitioner throughout his trial and no complaint is made that they did not properly and ably represent him. The only charge as to any failure

to properly represent petitioner is the charge that they rested his case without calling as a witness Mary A. Mullen for the purpose of proving that the witness, Edward Nowicki, was a perjuror when he testified that he knew petitioner two months previous to February 22, 1934 (R. 14). The petition does not disclose what the testimony of Mary Mullen would be, but it is apparent that the most her testimony could do would be to impeach the statement of the witness Nowicki as to the length of time which he had known petitioner. From other allegations in the petition, we might infer that her testimony would be that the petitioner was incarcerated in the Iowa State Penitentiary two months prior to the date of the alleged crime. In answer to a question as to the length of time that a witness has been acquainted with another, he may very easily fix such time at a few weeks longer than was the actual case and such error certainly would not prove him a perjuror. Neither would the length of time in which he knew the petitioner Hawk be any evidence to prove or disprove Hawk's guilt. This being the only error charged against the defense attorney in the conduct of the case, it can certainly not constitute a denial of due process. The record further discloses that following the verdict the public defender filed a motion for a new trial so as to fully protect petitioner in his right to an appeal and if petitioner had made the request it would have been the duty of the public defender to prosecute an appeal to the Supreme Court of Nebraska.

PERJURED TESTIMONY.

Petitioner refers to the testimony of certain witnesses as being perjured and states that the prosecuting officials

deliberately introduced this perjured testimony. The first witnesses charged with giving perjured testimony are two doctors, and an examination of the evidence set forth in the petition (R. 10) fails to disclose any perjury and further reveals that such testimony has no direct bearing on proving the guilt or innocence of the petitioner, but was evidence introduced for the purpose of establishing the cause of the death of Isadore Perelman.

Petitioner states that the witness, Dr. C. J. Toohey, testified at the preliminary hearing that Isadore Perelman was admitted to the Lord Lister Hospital the evening of February 28, 1934, and that said witness performed an emergency operation and removed a bullet from Mr. Perelman's groin, and that at about 1:30 a. m., March 1, 1934, the said Isadore Perelman died (R. 10).

Petitioner then states that at the trial a witness, Dr. S. McCleneghan, testified that he removed a bullet from Mr. Perelman's body at the Leslie O. Moore morgue on the 1st day of March, 1934 (R. 10). This evidence, if proven to have been given, as alleged in the petition, would certainly come far short of establishing that either of said witnesses perjured themselves in giving this testimony.

The next witness whom petitioner states gave perjured testimony is Paul DeSanti (R. 10-11). While petitioner states that the prosecution threatened to prosecute the witness on charges pending against him unless he gave testimony favorable to the state, as he did at the preliminary hearing, there are no facts set forth to support this allegation. Petitioner further states that the state impeached this witness, from which statement we can

only conclude that at the time of the trial the witness changed his story from that told at the preliminary hearing and gave testimony favorable to the petitioner. Under such a situation, certainly the state was entitled to impeach this testimony by showing his previous inconsistent statements and such evidence would not be evidence to either prove or disprove the guilt of the petitioner, but would merely be evidence going to the credibility of the witness.

Petitioner makes reference to some further testimony of the witness DeSanti which he himself states is "without and beyond the record but not inconsistent therewith." This testimony apparently had to do with the publication of a newspaper on the evening of February 28, 1934, and with the length of time previous to February 28, 1934, that the petitioner had been a guest at the witness' "bootleg joint."

Petitioner next asserts that the testimony of Edward Nowicki was perjured. A part of this witness' testimony is set forth in the petition (R. 12) in quotations, but it is apparent that it is not a direct quotation, but merely the statement of the petitioner. This statement is as follows:

> "That your Petitioner at all times was with he and Paul Taylor, during the attempted robbery and shooting of Isadore Perelman, the evening of February 28, 1934, and that the robbery was attempted at about 8 P. M. o'clock, and after the robbery and shooting of Isadore Perelman the three of us got in the car and driven away, and latter on at about nine o'clock the same evening the three of us returned to Paul DeSanti's bootleg joint and that while there an extra newspaper came out giving the account of the

attempted robbery and shooting of Isadore Perelman, and that previous to February 28, 1934, he had known your petitioner probably two or three months. He further testified that he was an inmate of the Nebraska State Penitentiary held in the County jail at the time of giving his testimony."

Petitioner sets forth (R. 12) that the source of his knowledge and ground for believing that this evidence is perjured is because it is uncorroborated and contradicted by the testimony of the witness Paul Taylor. Petitioner also makes the assertion that this witness was bribed and that such bribery will be proved by the subpoenaing of witnesses and introduction of evidence. No statement is made, however, as to who the witnesses are or what their testimony will be.

Petitioner then attempts to discredit the testimony of this witness by the statement that he "was a felon with a prison record dating back 12 years that he had served time in every penal institution in the State of Nebraska." In this connection, we might suggest that the record of petitioner far surpasses that of this witness. Even limiting this observation to the record he has not only served time in the penal institutions of Nebraska, but those of Iowa, as well as the federal penitentiaries at Leavenworth and Alcatraz. The rule that conviction of a felony may be considered as affecting the credibility of a witness may well be applied to the petitioner in this case.

If we are to determine which one of the two witnesses, Edward Nowicki or Paul Taylor, gave the perjured testimony, we believe that it must be determined in favor of Paul Taylor, who, at the preliminary hearing, testified that petitioner was an accomplice in the perpetration of

the crime, but changed his story at the time of the trial after he himself had pled guilty to being an accomplice and was serving his sentence in the Nebraska State Penitentiary. The testimony of Paul Taylor was impeached by showing his previous inconsistent statements at the time of the preliminary hearing, and also through the testimony of Fred Franks (R. 13) it was shown that he had given previous inconsistent statements to the prosecuting attorney and his assistant.

The question was one for the jury to determine which witness should be believed and apparently from their verdict they believed the witness Nowicki when he stated that the petitioner, Henry Hawk, was a party to the crime.

Point B.

A Charge That the Evidence was Insufficient to Sustain a Conviction Does Not Present a Federal Question, Since the Due Process Clause Does Not Imply a Guarantee Against an Erroneous Decision of a State Court.

Petitioner refers to certain other witnesses (R. 13-14) apparently for the purpose of showing that the evidence was insufficient to sustain a conviction. While we contend that this is a matter that cannot be raised in a habeas corpus proceedings, if any such charge is to be made it certainly becomes necessary for the petitioner to make all of the testimony a part of his petition. The Bill of Exceptions was in his possession, as disclosed by his petition (R. 14), wherein he states, "your petitioner will if necessary produce the bill of exceptions at the time of the hearing of this case and he now has said bill of exceptions in his possession." This Bill of Ex-

ceptions has been attached to and made a part of the petition in many of the applications made by petitioner in the past (see opinion in *Hawk v. Olson, Warden*; 130 Fed. (2d) 910). Petitioner should not be given greater rights because he is withholding this evidence from the court than he could secure when all of the facts were presented. A reading of the entire testimony disproves the claim of petitioner not only as to his contention with reference to the sufficiency of the evidence but also his contention of perjured testimony. If any part of this record is to be relied upon, the entire record should be made a part of this petition.

ERROR IN THE INSTRUCTIONS.

A complaint is made as to the instructions given by the court to the jury. However, an examination of these instructions (R. 27-32, inc.) discloses that they are the customary instructions given in a first degree murder case; that they correctly state the law of Nebraska and fully protect the rights of the defendant. Further, this is a matter which is not reviewable on habeas corpus. Neither is it a matter which may be inquired into on certiorari to this court, it being entirely a matter of procedure which has been determined adversely to petitioner by the Nebraska court.

However, neither the insufficiency of the evidence nor the alleged error in the instructions given by the trial court present a federal question. The petitioner has been fully heard in the regular course of judicial proceedings in the courts of the State of Nebraska and the due process clause implies no guarantee against an erroneous decision of a state court. *Central Land Company v. Laidley*, 16 Sup. Ct. 80, 159 U. S. 103, 40 L. Ed. 91;

Fillet v. *Steele*, 36 Sup. Ct. 550, 241 U. S. 648, 60 L. Ed. 1220; *Frank* v. *Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582.

Point C.

The Fact that a Defendant in an Information is Imprisoned, Serving a Sentence for Another Crime, Gives Him No Immunity From Prosecution.

Hawk v. *Olson, Warden*, — Neb. —, 16 N. W. (2d) 181.

Ponzi v. *Fessenden*, 258 U. S. 254, 42 Sup. Ct. 309, 312, 66 L. Ed. 607, 22 A. L. R. 879.

Rigor v. *State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719.

Cato v. *Smith*, 104 Fed. (2d) 885.

Kelley v. *Oregon*, 273 U. S. 589, 47 Sup. Ct. 504, 71 L. Ed. 790.

Kite v. *Commonwealth*, 11 Metc. (Mass.) 581, 585.

Thomas v. *People*, 67 N. Y. 218, 226.

Another point raised by petitioner is that at the time of his trial he was a prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas, and was brought to Omaha in the custody of federal officers. Following his conviction, he was returned to the penitentiary at Leavenworth and later transferred to Alcatraz (R. 16). Upon the completion of his sentence in the federal penitentiary, petitioner was delivered to the authorities at Oakland, California, who returned him to Nebraska and placed him in the Nebraska State Penitentiary. By this, petitioner alleges that he was "kidnaped and committed to the Nebraska State Penitentiary" (R. 17-18).

This contention of petitioner is fully answered by the Nebraska Supreme Court in their opinion in *Hawk* v. *Olson*, 16 N. W. (2d) 181, as follows:

> "The petition states that he was brought to Omaha for trial by the federal authorities and then returned by them to the federal prison; and that when his term in the federal penitentiary expired the federal authorities turned him over to the state authorities. As stated in Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 312, 66 L. Ed. 607, 22 A. L. R. 879: '* * * the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. * * * "The penitentiary is not a place of sanctuary, and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt."' As stated in Rigor v. State, 101 Md. 465, 61 A. 631, 4 Ann. Cas. 719: 'That accused is serving a sentence under a prior conviction of a distinct crime is no ground for postponing his trial until the expiration of such sentence.' See, also, Cato v. Smith, 9 Cir., 104 F. (2d) 885; Kelley v. Oregon, 273 U. S. 589, 47 S. Ct. 504, 71 L. Ed. 790. And in Ponzi v. Fessenden, supra: 'Nor, * * * is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite v. Commonwealth, 11 Metc. (Mass.) 581, 585, an opinion by Chief Justice Shaw, Ex parte Ryan, 10 Neb. 261; Thomas v. People, 67 N. Y. 218, 226.'"

Point D.

In an Application for a Writ of Habeas Corpus Petitioner Must Allege Facts Sufficient to Entitle Him to the Writ, Mere Conclusions Being Insufficient.

Tail v. *Olson*, 145 Neb. —, 16 N. W. (2d) 226.

ORDEAL AND MOBOCRACY.

This leaves for consideration the charge that "said commitment, trial and conviction were obtained by ordeal and mobocracy, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Consitution of the United States" (R. 6).

Funk & Wagnalls Dictionary defines ordeal as, "a mediaeval form of judicial trial wherein supernatural aid was invoked in the place of evidence, as in trial by fire, water or battle," and, mobocracy is defined as, "lawless control of public affairs by the mob or populace." Nowhere in the record do we find any allegations of fact which would tend to show that petitioner was convicted because of a trial either by fire, water or battle. Nor do we find any allegations that would show, or even imply to the least degree, that his trial was controlled by the mob. So far as the record discloses, no one was present at the trial except the officers of the court, prosecution and defense attorneys, the jury and the witnesses. Every allegation of fact with reference to the trial points to the utter falsity of this charge, since it demonstrates a trial according to the regular rules of procedure of Nebraska, an information in due form was filed, witnesses were called who were examined and cross-examined, the jury was properly instructed by the court and the cause submitted to them, and, following deliberation, a verdict of guilty returned against the petitioner.

Further, is there no presumption of regularity in the proceedings of our trial courts? Have our trial courts come into such disrepute that whenever a convicted felon charges them with dishonesty, unfairness, etc., unsup-

ported by any allegations of fact, the judge of the court must be called to the witness stand to defend his honesty and integrity?

Must a hearing be had on these charges and the state put to the expense of bringing to Lancaster County, Nebraska, the trial judge, the prosecuting attorneys, defense attorneys, court reporters and all other officials who have anything to do with this trial in order to disprove these charges which are unsupported by any statement of fact? Must these proceedings be repeated every few months whenever Mr. Hawk sees fit to make a new charge of a denial of due process of law?

We believe that society, as well as the defendant, is entitled to due process of law in a criminal prosecution. While there is a presumption of innocence of a person charged with a crime, such presumption should continue only until such person has been convicted and thereafter certainly the courts are entitled to a presumption of regularity in their proceedings and the burden should be placed upon the defendant to allege and prove any charges of irregularity. Before a hearing must be had he should be required to state his charges through allegations of fact and not mere conclusions, and, certainly in a case such as the instant one, where all of the allegations of fact disprove the charges made, the petitioner is not entitled to a hearing.

Point E.

The Application for a Writ of Certiorari Should be Denied, Since All of the Allegations of the Petition Together Fail to Disclose a Denial of Due Process.

Ordinarily "law, in its regular course of administration through courts of justice is due process, and when

secured by the law of the state, the constitutional requisition is satisfied." *Caldwell* v. *Texas*, 137 U. S. 691, 11 Sup. Ct. 224, 34 L. Ed. 816. And due process is so secured by laws operating on all alike and not subjecting an individual to the arbitrary exercise of the powers of government.

In *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252, this court has said that an asserted denial of due process "is to be tested by an appraisal of the totality of facts in a given case."

In *Frank* v. *Mangum*, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969 it was contended that the "due process" clause was violated in a Georgia murder prosecution. The opinion is quite long, but the following portion is applicable. On page 979 of the L. Ed., the court said:

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. (Citing cases.)"

All the 14th Amendment guarantees, so far as state procedure is concerned, is notice, an opportunity to be heard, and a trial which does not violate fundamental principles of fairness.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 595, it was said:

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining v. New Jersey, 211 U. S. 78, 106, 111, 112, 53 L. Ed. 97, 109, 111, 112, 29 S. Ct. 14; Rogers v. Peck, 199 U. S. 425, 434, 50 L. Ed. 256, 260, 26 S. Ct. 87; Maxwell v. Dow, 176 U. S. 581, 604, 44 L. Ed. 597, 606, 20 S. Ct. 448, 494; Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292; Frank v. Mangum, 237 U. S. 309, 326, 59 L. Ed. 969, 979, 35 S. Ct. 582; Powell v. Alabama, 287 U. S. 45, 67, 77 L. Ed. 158, 169, 53 S. Ct. 55, 84 A. L. R. 527. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176 U. S. 581, 44 L. Ed. 597, 20 S. Ct. 448, 484, supra; New York C. R. Co. v. White, 243 U. S. 188, 208, 61 L. Ed. 667, 667, 37 S. Ct. 247, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. Ed. 961, 964, 43 S. Ct. 589. Indictments by a grand jury may give way to informations by a public officer. Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111, 292, supra; Gaines v. Washington, 277 U. S. 81, 86, 72 L. Ed. 793, 795, 48 S. Ct. 468. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a wit-

ness for the state. Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14, supra. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14, supra; Powell v. Alabama, supra (287 U. S. 68, 71, 77 L. Ed. 170, 171, 53 S. Ct. 55); Homes v. Conway, 241 U. S. 624, 60 L. Ed. 1211, 36 S. Ct. 681. Cf. Blackmer v. United States, 284 U. S. 421, 440, 76 L. Ed. 375, 384, 52 S. Ct. 252."

Elsewhere in the opinion the court said (p. 684 of 78 L. Ed.):

"The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' Owenbey v. Morgan, supra (256 U. S. p. 110, 65 L. Ed. 845, 41 S. Ct. 433, 17 A. L. R. 873)."

And still later in the opinion (p. 868 of 78 L. Ed.) the court said:

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an oppor-

tunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

"The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged semper ubique et ab omnibus (Otis v. Parker, 187 U. S. 606, 47 L. Ed. 323, 327, 23 S. Ct. 168), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt - - that discredit will even touch the great immunities assured by the Fourteenth Amendment - - if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In the same opinion, the following language is found in the dissent of Mr. Justice Roberts (p. 689 of 78 L. Ed.):

"The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affects property or liberty or life, the Fourteenth Amend-

ment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing. Though the usual and customary forms of procedure be disregarded, it safeguards the defendant's substantial rights."

In *Palko* v. *Connecticut*, 302 U. S. 319; 58 Sup. Ct. 149, 82 L. Ed. 288, the court said:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that *neither liberty nor justice would exist if they were sacrificed.* Twining v. New Jersey, supra (211 U. S., p. 99, 53 L. Ed. 106, 29 S. Ct. 14)."

CONCLUSION.

Petitioner has presented nothing new in his instant application for a writ of certiorari, the same issues having been determined several times before by both the Nebraska and Federal courts, and for this reason alone the District Court of Lancaster County, Nebraska, was justified in denying the application for the writ. The court found as an additional basis for denying the writ that the petition failed to state sufficient facts to warrant the issuance of the writ. In this finding, they were also

correct, as has been disclosed by our review herein of the allegations of the petition.

None of the charges set forth in the petition disclose a lack of jurisdiction on the part of the trial court or a violation of any constitutional rights which would deprive the court of jurisdiction. No federal question is therefore involved which may be considered by this court.

It is apparent that this petition is another of the numerous, meritless applications made by the petitioner for the sole purpose of harassing the courts and law enforcement officials. To sustain petitioner will be making the writ of habeas corpus an instrument of oppression instead of an instrument of liberty. The application for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1945.

Henry Hawk, Petitioner, *vs.* Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska.	On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[November 13, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari brings before us the judgment of the Supreme Court of Nebraska which affirmed a judgment of a district court dismissing a petition for habeas corpus to inquire into petitioner's detention for want of merit and failure to state a cause of action. 14 S. C. J. 24 (Neb.); *Hawk* v. *Olson*, 16 N. W. 2d 181.[1] Petitioner was in the penitentiary after conviction for murder. The writ was granted because a substantial federal question as to restraint without due process of law under the Fourteenth Amendment seemed to be presented by the petition for certiorari and the response. 324 U. S. 839.

As no response was filed or evidence received in the district court, we accept as true all well pleaded allegations of the petition and, in the exercise of the duty which lies on us as well as the Nebraska courts to safeguard the federal constitutional rights of petitioner, examine for ourselves whether under the facts stated the petitioner is now entitled to a hearing on the claimed violations of the due process clause in his conviction for murder in the first degree. *Lisenba* v. *California*, 314 U. S. 219, 237; *White* v. *Ragen*, 324 U. S. 760.

[1] The opinion of the Supreme Court of Nebraska does not deal with an alternate ground of the district court judgment. This was that previous petitions for habeas corpus had "fully and finally adjudicated" the present issues. Compare Salinger v. Loisel, 265 U. S. 224, 230; Ex parte Hawk, 321 U. S. 114, 118. We do not consider this issue.

The following reported cases show the efforts of petitioner to secure release. There are other proceedings not reported. Hawk v. O'Grady, 137 Neb. 639 (appeal from denial of writ in state District Court), cert. den. 311 U. S. 645; Hawk v. Olson, 130 F. 2d 910 (appeal from denial of writ in District Court), cert. den. 317 U. S. 697; 318 U. S. 746 (original); 321 U. S. 114 (original).

In its opinion the Supreme Court of Nebraska carefully considers a number of claims of denial of due process. It is said that some of the grounds for release are pleaded in the form of conclusions and that Nebraska procedure requires in habeas corpus proceedings that the applicant must set forth the facts from which it must appear that he will be entitled to discharge. *Hawk* v. *Olson*, 16 N. W. 2d 181, 183, r.c. We assume, since such grounds appear in the petition, that one of these pretermitted grounds is that "Conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and the Trial Court." See *Ex parte Hawk*, 321 U. S. 114, 116. Whatever Nebraska may require in the way of further specification may be furnished, if available, and permissible under the law of Nebraska (see *Hawk* v. *Olson*, *supra*, 183, r.c), by petitioner on a new hearing. Cf. *Tomkins* v. *Missouri*, 323 U. S. 485, 487. On the issues of the sufficiency of the evidence and the interference with the right of appeal, we accept the decision of Nebraska that the first cannot be raised by habeas corpus (*Hawk* v. *Olson*, 16 N. W. 2d 181, 183) and that the second is not supported by the facts stated by petitioner.[2] Other objections to the judgment have been made which are not discussed herein but which we have looked into and which we do not consider merit further attention.

Petitioner contends that his conviction violates the Fourteenth Amendment because of denial at his trial of an opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense. Denial of effective assistance of counsel does violate due process. *Powell* v. *Alabama*, 287 U. S. 45, 58; *House* v. *Mayo*, 324 U. S. 42, 46; compare *White* v. *Ragen*, 324 U. S. 760, 764.

Since *Frank* v. *Mangum*, 237 U. S. 309, 331, this Court has recognized that habeas corpus in the federal courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution," even though the events which were alleged to infringe did not

[2] Lack of counsel and wrongful withholding by judicial officers of the necessary record form the substance of this claim. The opinion of the Supreme Court of Nebraska disposes of this by pointing out that petitioner never alleged a request to the Public Defender for assistance on appeal and that a mandamus [for the record] was denied. We assume the denial was proper as petitioner makes no complaint as to it. On the present record the failure to seek review from the conviction was without excuse. 16 N. W. 2d 181, 184.

appear upon the face of the record of his conviction. This opportunity for an examination into the "very truth and substance of the causes of his detention" was said in the *Frank* case to have come from the adoption in 1867 of a statute which empowered federal courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, Chap. XXVIII.[3] The legislation enlarged for the federal courts the "bare legal review" of the authority under which a petitioner was held which had been previously afforded by habeas corpus.[4] *Johnson* v. *Zerbst*, 304 U. S. 458, 465-67. See also *In re Neagle*, 135 U. S. 1, 69-76; *McNally* v. *Hill*, *Warden*, 293 U. S. 131.

This liberalization of habeas corpus required federal courts, when the issue was presented, to examine whether a conviction occurred under such influence by mob spirit as to deny due process. *Frank* v. *Mangum*, *supra*, 331, 335, dissent 347. The power was called into play a few years later to examine a state conviction under alleged community coercion and this Court said that if the facts set out were true, the trial would not support a conviction. *Moore* v. *Dempsey*, 261 U. S. 86. In *Mooney* v. *Holohan*, 294 U. S. 103, 112, it was declared that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment.

When the absence of counsel at a trial was urged as a ground for a federal writ of habeas corpus, we held that in federal courts a felony conviction without benefit of counsel is subject to collateral attack because a violation of the accused's constitutional right to the services of an attorney unless he has intelligently

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[3] This statute was reenacted as R. S. §§ 752-761. The provision now appears in 28 U. S. C. § 453:

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is . . . in custody in violation of the Constitution or of a law or treaty of the United States; . . ."

The section had its origin in a bill [No. 605] reported by the Judiciary Committee of the House in response to a resolution directing that committee to inquire and report to the House by bill or otherwise "what legislation is necessary to enable the courts of the United States . . . to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." See Cong. Globe, 39th Cong., 1st Sess., 87, 4151. The debates on the bill in the House and Senate, while mostly concerned with incidental matters, indicated that jurisdiction to issue the writ of habeas corpus was not intended to be limited merely to violations of the Thirteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 4150, 4151, 4229; Cong. Globe, 39th Cong., 2d Sess., 730, 790.

[4] See Ex parte Watkins, 3 Pet. 193, 202, cited in the Frank case, and 4 Bacon's Abridgement 563, *et seq.*, Johnson Edition 1856; XIV Viner's Abridgement, (2d Ed.), 212(D) and 217(F)(2).

waived that privilege. *Johnson* v. *Zerbst*, *supra*, 467-68; *Walker* v. *Johnston*, 312 U. S. 275, 286. The same is true in instances of coercion. *Waley* v. *Johnston*, 316 U. S. 101, 104.

In state prosecutions a conviction on a plea of guilty, obtained by a trick, *Smith* v. *O'Grady*, 312 U. S. 329, 334, or, after refusal of a proper request for counsel, because of the accused's incapacity adequately to defend himself, *Williams* v. *Kaiser*, 323 U. S. 472, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See *Tomkins* v. *Missouri*, 323 U. S. 485; *Cochran* v. *Kansas*, 316 U. S. 255. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. *Powell* v. *Alabama*, *supra*, 52, 58; *House* v. *Mayo*, 324 U. S. 42. Compare *Ex parte Hawk*, 321 U. S. 114; *Glasser* v. *United States*, 315 U. S. 60, 69-70. When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White* v. *Ragen*, 324 U. S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. *Williams* v. *Kaiser*, 323 U. S. 472; *Tomkins* v. *Missouri*, *supra*.

Petitioner, a layman, set out the following allegations in his petition. On March 16, 1936, at 4:15 p.m., the petitioner, who had previously had a preliminary hearing, was brought to Omaha from the federal penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening, 11 to 11:15 p.m., by the Public Defender and his assistant. These officials tried to intimidate the petitioner to plead guilty. This petitioner refused to do, "... at which time the two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning." The next day petitioner was arraigned and was read an information charging the murder to which he pleaded "not guilty,"[5] and "forthwith moved the Trial Court orally for a con-

[5] Petitioner does not allege whether or not he had previously received a copy of the charge in conformity with the requirement of Revised Statutes of Nebraska § 29-1802 which provides that: "Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant. No one shall be, without his assent, arraigned

tinuance of twenty-four (24) hours for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three Jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

"Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (wednesday), 1936." Petitioner claimed the protection of the Fourteenth Amendment. The record is either silent on or not inconsistent with anything material in these allegations. Cf. *Tomkins* v. *Missouri*, 323 U. S. 485, 487. There is no allegation or suggestion of ignorance of or unfamiliarity with procedural or substantive law or sub-normal mentality.

These facts, if true, we think, set out a violation of the Fourteenth Amendment. They are not conclusions of law. They are not too vague. The charge upon which petitioner was convicted was murder in the first degree. He had no advice of counsel prior to the calling of the jury. His motion for continuance to examine the charge and consult counsel was made without assistance. Homicide has degrees in Nebraska. Comp. Stat. Neb. 1929, § 28-401 to § 28-403. There are difficulties in the application of the rules. *In re Application of Cole*, 103 Neb. 802, 805; *Bourne* v. *State*, 116 Neb. 141. The defendant needs counsel and counsel needs time. Cf. *Tomkins* v. *Missouri*, 323 U. S. 485, 488.

As the Supreme Court of Nebraska considered the motion for continuance on the merits,[6] no question of state procedure for the reexamination of criminal convictions arises. As to the issue on the motion for continuance, our duty requires us to determine only whether or not the denial under the facts alleged violates due

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or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." Section 29-1604 makes this section applicable to an information."

[6] Hawk v. Olson, 16 N. W. 2d 181, 184.

process. We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment.

Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights he has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires. This, of course, does not mean that uncontradicted evidence of a witness must be accepted as true on the hearing. Credibility is for the trier of facts. The evidence may show that the charge was served upon petitioner well in advance of the trial (see note 5, *supra*) and that he had ample opportunity to consult with counsel and secure any needed witnesses. He may have intelligently waived his constitutional rights. *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 275.

Petitioner carries the burden in a collateral attack on a judgment.[7] He must prove his allegations but he is entitled to an opportunity.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[7] Johnson *v.* Zerbst, 304 U. S. 458, 468; Walker *v.* Johnson, 312 U. S. 275, 286; Williams *v.* Kaiser, 323 U. S. 472, 474.